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Supreme Court of the United States

October Term, 1997

CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; JOHN DOLAN; RON KENNER, BOONE COUNTY SHERIFF; ROB REUTHE; AND CHRIS ALSIP,

Petitioners,

v.

WILLIAM CHIPMAN, ADMINISTRATOR OF THE ESTATE OF CONNI BLACK, AND SUSAN STEMLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit's expansion of the concept of "custody" in the context of a substantive due process claim conflicts with the Supreme Court's definition and the interpretation of other U.S. Courts of Appeal so as to improperly deny qualified immunity to the Officers under the clearly established law in February, 1994.

2. Whether the Sixth Circuit's enunciation of "deliberate indifference" as a "knew or reasonably should have known" standard converts an ordinary negligence action into a constitutional claim in direct conflict with Supreme Court precedent.

3. Whether a state court's prior adjudication on the issues of the existence of a special relationship and causation, is entitled to preclusive effect in a subsequent §1983 action in federal court.

PARTIES

The caption of the case contains the names of all parties to the proceeding: City of Florence; Bobby Joe Wince; Thomas Dusing; John Dolan; Ron Kenner, Boone County Sheriff; Rob Reuthe; Chris Alsip; William Chipman, Administrator of the Estate of Conni Black; and, Susan Stemler.

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PETITION FOR A WRIT OF CERTIORARI

City of Florence; Bobby Joe Wince; Thomas Dusing; John Dolan; Ron Kenner, Boone County Sheriff; Rob Reuthe; and Chris Alsip, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on October 8, 1997.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Stemler v. City of Florence*, 126 F.3d 856 (CA6 1997), and is attached in the Appendix, *infra*, pp. 1a-45a. The Court of Appeals denied the Petition for Rehearing on November 13, 1997. The Order denying the Petition for Rehearing is not reported and is attached in the Appendix, *infra*, pp. 46a-47a. The Opinions of United States District Court for the Eastern District of Kentucky, Covington Division are reported as *Chipman v. City of Florence*, 858 F.Supp. 87 (E.D. Ky. 1994) and 866 F.Supp. 332 (E.D. Ky. 1994) and are attached in the Appendix, *infra*, pp. 48a-64a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 8, 1997. (Appendix, *infra*, pp. 1a-45a). On November 13, 1997, the Court of Appeals denied a timely Petition for Rehearing (Appendix, *infra*, pp. 46a-47a). Pursuant to Supreme

Court Rule 13.1 and 13.3, this Petition has been filed within ninety (90) days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment 14 Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The Sixth Circuit Court of Appeals reversed the District Court's Orders granting the officers'[1] qualified immunity on their FRCP 12(b)(6) Motion to Dismiss. Therefore, the only matters relevant to the appeal were the allegations in the Complaint and Amended Complaint. In his Complaint and Amended Complaint, Chipman alleges that Black had been assaulted and threatened by her boyfriend, Kritis, on the evening of February 18, 1994 and that he had chased Black and her driver, Stemler, from the location of their initial encounter. Stemler is alleged to have informed the officers of those facts after the officers came upon Stemler and her passenger, Black, and Kritis in their vehicles which were stopped at a traffic light in Florence, Kentucky. Stemler was arrested for driving under the influence of alcohol. The Complaint

[1] Hereinafter, Bobby Joe Wince, John Dolan, Thomas Dusing, Rob Reuthe and Chris Alsip will be collectively referred to as the "officers". William Chipman, Administrator of the Estate of Conni Black, will be referred to as "Chipman". The decedent, Conni Black, will be referred to as "Black".

alleges that Black and Kritis were both intoxicated. It is also claimed that the officers gave Black an option: Go with Kritis or be charged with the criminal offense of alcohol intoxication. The Complaint states that Black "capitulated" and "involuntarily" went with Kritis whose truck crashed within a short time after leaving the officers. Black died as a result of the truck crash. (Appendix, *infra*, pp. 82a-90a).

Chipman, as Black's administrator, filed suit against the police officers in their individual capacities, the City of Florence and the Boone County Sheriff. In his Complaint, Chipman claimed that the officers caused Black's death, depriving her of life without due process of law, by failing to properly investigate the situation at the traffic stop, and thus, failing to discover that Kritis was intoxicated, and by forcing Black to go with Kritis "under threat of arrest" for public intoxication. Chipman's theory is that Black was in the custody of the police officers at the traffic stop, triggering a duty to protect her from harm by Kritis under the Fourteenth Amendment substantive due process clause.

B. PROCEEDINGS BELOW:

1. Companion State Court Proceeding.

On March 7, 1994, Chipman filed a Complaint before the Boone County Circuit Court, asserting state claims for negligence against the Florence police officers, Thomas Dusing, John Dolan, Bobby Joe Wince; the City of Florence; Boone County Sheriff, Ron Kenner; Deputy Sheriff, Rob Reuthe; and Deputy Sheriff, Chris Alsip. After the

completion of discovery, the Boone County Circuit Court granted summary judgment on April 2, 1996 on all of the claims asserted by Chipman and, as a matter of law, found that at the time of Black's death, she was neither in state custody nor otherwise restrained by the state, and that the violence or other offensive conduct leading to her death was not perpetrated by a state actor. (Appendix, *infra*, pp. 82a-85a).

2. U.S. District Court Proceeding.

Chipman filed his Complaint asserting his federal claim on March 31, 1994, designating as defendants the same persons and entities which were named in the action filed before the Boone County Circuit Court.

The officers filed a Motion to Dismiss the claims against them in their individual capacities based on qualified immunity on April 28, 1994. On August 2, 1994, the District Court issued an Opinion and Order dismissing the Complaint against all of the officers in their individual capacities based on qualified immunity. (Appendix, *infra*, pp. 48a-56a).

On August 12, 1994, Chipman filed a Motion to Reconsider the grant of qualified immunity to the officers and a Motion for Leave to Amend his Complaint to set forth allegations against the individual officers.

After the filing of the Amended Complaint, further briefing by the parties, and oral argument, the Court entered its Opinion and Order on October 12, 1994 denying Chipman's Motion to Reconsider and dismissing the

Amended Complaint based on qualified immunity. (Appendix, *infra*, pp. 57a-64a).

Between October 12, 1994 and March, 1996, the parties engaged in substantial discovery on Chipman's claim of municipal liability for the alleged failure to adequately supervise and train the police officers, and Chipman's state law claims pending before the Boone County Circuit Court. To conserve resources, the parties agreed that discovery taken in the federal and state court actions would be interchangeable to the extent that the discovery was relevant to the issues in either lawsuit.

After discovery was completed, Florence and Boone County filed Motions for Summary Judgment on Chipman's municipal liability claims. The District Court issued its Opinion and Order on July 3, 1996, granting summary judgment to the governmental entities.

Chipman timely appealed his case to the Sixth Circuit along with Susan Stemler. The Sixth Circuit consolidated the cases. Oral argument was heard on August 1, 1997 and the Court of Appeals issued its Opinion and Order on October 8, 1997. While the Sixth Circuit affirmed the District Court's ruling that the municipal defendants were entitled to summary judgment, it reversed the District Court's ruling that the individual officers were entitled to qualified immunity.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S EXPANSION OF THE CONCEPT OF "CUSTODY", IN THE CONTEXT OF A SUBSTANTIVE DUE PROCESS CLAIM, CONFLICTS WITH THE SUPREME COURT'S DEFINITION AND THE INTERPRETATION BY OTHER U.S. COURTS OF APPEAL SO AS TO IMPROPERLY DENY QUALIFIED IMMUNITY TO THE OFFICERS UNDER THE CLEARLY ESTABLISHED LAW IN FEBRUARY, 1994

A. CUSTODY

1. The Sixth Circuit's Opinion Conflicts With U.S. Supreme Court Precedent.

There is a direct conflict between the Sixth Circuit's Opinion and the U.S. Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), which was the clearly established law in February, 1994.

DeShaney, supra makes it clear that "[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors . . . Its purpose was to protect people from the State, not to insure that the State protect them from each other." *Id.* at p. 196, 109 S.Ct. at 1003.

The Supreme Court announced a very narrow exception to this general rule by holding that the state has a duty to protect an individual citizen only when the state has taken that person into its custody:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 200, 109 S.Ct. at 1006.

In addition to its definition of "custody", the Court made it clear that the duty to protect lasts only as long as the person remains in the state's custody. Citing other precedent, the Court stated:

> Taken together, they stand only for the proposition that when the State takes a person into its custody *and holds him there against his will*, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

Id. at 199, 109 S.Ct. at 1005 (Emphasis added.)

Applying these rules to the facts alleged in *DeShaney, supra*, the Supreme Court affirmed the grant of summary judgment to the Defendants. Specifically, the Court found that the social workers were not under a duty to protect Joshua because "the harms Joshua suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor." *Id.* at 200, 109 S.Ct. at 1006.

The Supreme Court refused to speculate on whether there would have been a duty to protect Joshua from mistreatment at the hands of a foster parent had the state

affirmatively exercised its power by removing Joshua from free society and placing him in a state operated foster home. *Id.* at 201, n.9, 109 S.Ct. 1006, n.9. The Supreme Court thus made it clear that "custody" triggering the duty to protect from third party harm must be a significant, ongoing deprivation of freedom comparable to incarceration or involuntary institutionalization. In comparison, it is obvious that the temporary interaction between Black and the police officers in this case was not "custody" as defined by the Supreme Court. The Sixth Circuit's refusal to recognize this difference operates to expand the concept of substantive due process beyond the limits set by the Supreme Court and warrants a grant of certiorari.

In this case, the District Court correctly applied the rule of law from *DeShaney, supra,* in granting the officers' Rule 12(b)(6) motion based on the defense of qualified immunity. The District Court accepted the allegations in the Complaint and Amended Complaint as true, and in its correct application of *DeShaney,* found that at the time she was fatally injured, Black was not in the custody of the officers. Rather, at the time of Black's injuries, she was in the truck with Kritis, who was not a state actor or an agent of the state. The District Court thus correctly found that Black was never in "custody" as defined by *DeShaney, supra.* The District Court was also correct in its determination that under the clearly established law, a reasonable officer in the officers' position would not have known that giving Black the choice of leaving with Kritis or going to jail violated her Fourteenth Amendment substantive due process rights. (Appendix, *infra,* pp. 48a-64a).

Quite simply, the Sixth Circuit's view of what constitutes "custody" for the purposes of a Fourteenth Amendment substantive due process analysis is in direct conflict with the narrow holding of *DeShaney, supra*. The officers' alleged option to Black that she either leave with Kritis or be charged with the offense of alcohol intoxication, along with the alleged assistance the officers gave her in getting into Kritis's truck, cannot reasonably be equated with the substantial restraint of an "individual's freedom to act on their own behalf" which results from "incarceration, institutionalization, or other similar restraint of personal liberty," thereby triggering a duty to protect that person from third party harm. *DeShaney, supra*, 489 U.S. at 200, 109 S.Ct. at 1009.

Instead of applying the Supreme Court's definition of custody, the Sixth Circuit broadly proclaimed that "under any definition of the term, Black was in the Defendant officers' custody at the time she was forced into Kritis's truck." *Stemler v. City of Florence*, 126 F.3d 867-68 (CA6 1997). Such a declaration, for the purposes of the qualified immunity analysis, cannot be reconciled with the only definition of "custody" that is relevant and applicable – the one mandated by *DeShaney, supra*.

Not only did the Sixth Circuit err in holding that Black was in "custody" of the officers for purposes of the Fourteenth Amendment, it failed to appreciate the fact that Black had left the presence of the officers and was alone with Kritis in his pickup truck when the crash that claimed her life occurred. Not only was Black not in the "custody" of the officers, her fatal injuries occurred as a result of actions taken by a private individual who was not a state actor or an agent of the officers. Chipman's

claims, just as those in *DeShaney, supra,* are for injuries that occurred outside of state custody and at the hands of a private actor. The Sixth Circuit, by redefining "custody" in the context of a substantive due process claim, has expanded the parameters of this concept beyond that contemplated by *DeShaney, supra,* and is in direct contradiction to the prior holdings of the Supreme Court.

2. The Sixth Circuit's Opinion Conflicts With A Prior Decision In That Circuit.

The Sixth Circuit's Opinion also conflicts with a prior decision in its own circuit. In *Foy v. City of Berea,* 58 F.3d 227 (CA6 1995), the panel applied *DeShaney, supra,* to facts closely analogous to the instant case and found that there was no "custody" triggering a Fourteenth Amendment substantive due process right. In *Foy, supra,* police officers were confronted with two intoxicated individuals who were causing a disturbance at a local college. The police ordered the pair to "get in your car and get out of here or somebody is getting arrested." *Foy,* at 229. The two individuals drove away and subsequently were involved in a fatal accident. The *Foy* Court applied the definition of "custody" from *DeShaney, supra,* and found that "neither Foy nor Phillips were ever in custody." *Id.* at 231. This determination of that threshold issue was critical in the grant of qualified immunity to the police officers in *Foy, supra.* The Sixth Circuit's expanded concept of "custody" in the instant case is in direct conflict with the rule of law in *Foy, supra.*

The Sixth Circuit's review of the District's Court's dismissal of the claims against the officers is limited to

the facts as alleged in the Complaint and Amended Complaint. The Court's review is *de novo* and it must treat as true all the well-pleaded allegations of the Complaint and Amended Complaint. "In order for a dismissal to be proper, it must appear beyond doubt that the Plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the Complaint." *Bower v. Federal Express Corp.*, 96 F.3d 200, 203 (CA6 1996). Here, the Sixth Circuit went beyond the factual allegations of the Complaint and Amended Complaint and interpreted record evidence to support those claims. *See, e.g., Stemler,* 126 F.3d at p. 866 in the Court's discussion of custody. The Court clearly went beyond the scope of review allowed and its actions conflict with the above-cited, well-established Sixth Circuit precedent. Based on the facts as alleged in the Complaint and Amended Complaint, Black was not in "custody" and her injuries were at the hands of a private actor, entitling the officers to qualified immunity.

3. The Sixth Circuit's Opinion Conflicts With Another Circuit's Application Of Supreme Court Precedent.

The Sixth Circuit held that the officers owed a duty of care to Black despite the undisputed fact that at the time of her death, she was in Kritis' truck. The Court avoided facing this fact directly and instead focused on whether a custodial relationship existed *prior to* the fatal accident. Thus, the Sixth Circuit's conclusion that Black was in the officers' custody "at the time she was forced into Kritis' truck" changed the focus of the custody/

injury relationship necessary for a Fourteenth Amendment substantive due process claim. *Stemler*, 126 F.3d at 869. Using this misguided focus, the Court then incorrectly concluded that a special relationship existed between the officers and Black, giving rise to a duty to protect.

Under *DeShaney*, however, the issue is not whether the victim was in custody ***at some time prior to the injury***. Rather, the focus, in a special relationship case, is ***whether the victim was in custody at the time of her injury or death***. *DeShaney*, 489 U.S. at 199, 109 S.Ct. at 1005. The Sixth Circuit's holding to the contrary is not only in conflict with *DeShaney*, but also conflicts with other circuit court holdings.

In *Wooten v. Campbell*, 49 F.3d 696 (CA11 1995), Wooten obtained a Court Order prohibiting her son's father, Michael, from coming within 500 yards of either her or her son, Daniel. Shortly thereafter, Michael abducted Daniel. He was arrested a month later for felony interference with custody. The Department of Human Resources ("DHR"), obtained authority from the Juvenile Court to place Daniel. DHR ultimately returned Daniel to Wooten's home and allowed Michael to visit him once every two weeks. Several months later, DHR allowed Michael to have unsupervised visits with Daniel. Within two months, Michael again abducted Daniel. Nearly two months later when the police found Daniel and Michael, they discovered that Michael had shot and killed Daniel and that Michael had committed suicide. *Wooten*, 49 F.3d at 698.

Wooten filed suit against DHR alleging a substantive due process failure to protect claim. The Court, in reversing the District Court's denial of DHR's motion to dismiss, noted that the facts of this case were "very similar to the facts in *DeShaney* . . . " *Wooten*, 49 F.3d at 699. The Court noted that "[a]s in *DeShaney*, Michael was a private actor . . . There is no special relationship here: Daniel was in the physical custody of his natural mother when his natural father took him; . . . " *Wooten*, 49 F.3d at 700. It is significant that in *Wooten*, DHR was on notice of the fact that just seven months prior to the fatal abduction, Michael had already abducted Daniel and had been arrested for felony interference with custody. Moreover, DHR allowed Michael to have unsupervised visits with Daniel. *Wooten*, 49 F.3d at 698. Thus, despite the fact that DHR essentially gave Daniel back to Michael, it incurred no liability.

In *Stemler*, the Court attached a great deal of significance to the fact that the officers "forced" Black into Kritis's truck. *Stemler*, 126 F.3d at 856. The simple fact is, however, that Kritis, like Michael, is a private actor. In *Wooten*, Daniel was not injured when DHR allowed Michael to have unsupervised visits. Rather, Daniel was injured by Michael. Similarly, Black was not injured when she was "forced" into Kritis's truck. Rather, it was only later, albeit a short time later, that Black was fatally injured, not by the officers, but rather by Kritis. As the Court stated in *Wooten*, "[w]e must remember that the individual truly responsible for this tragedy is Michael, not the state, for it was Michael who shot Daniel and then killed himself." *Wooten*, 49 F.3d at 701-02.

It is clear, then, that the *Wooten* court, unlike the *Stemler* court, applied the special relationship test consistent with the Supreme Court's mandate in *DeShaney*: "[W]hen the state takes a person into its *custody and holds him there against his will*, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199, 109 S.Ct. at 1005 (Emphasis added). The Court should grant this petition to resolve this conflict in the circuits regarding the proper application of *DeShaney*'s special relationship test.

B. QUALIFIED IMMUNITY

Despite finding that a good deal of uncertainty exists as to the contours of substantive due process in the context of indirect injury claims, the Sixth Circuit Court of Appeals refused to grant qualified immunity to the officers, who are not constitutional scholars, but rather simply policemen responding in good faith to a call. Since this Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), it has been well-settled that government officials performing discretionary functions are generally entitled to qualified immunity from civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The concept of "clearly established law" was clarified by *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523, 530-31 (1987), where the Supreme Court stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

In reversing the District Court's grant of qualified immunity to the officers, the Sixth Circuit redefines qualified immunity contrary to Supreme Court precedent. Under the Sixth Circuit's interpretation, police officers will be denied qualified immunity even when the law is not clearly established. This is evident in the Sixth Circuit's concession that "there is a good deal of uncertainty with regard to the precise contours of substantive due process", and that in February of 1994, the "law may have been unclear, or even hotly disputed, at the margins". *Stemler,* 126 F.3d at 867.

The Sixth Circuit's denial of qualified immunity to the officers on Chipman's substantive due process claim conflicts with the holdings of other Circuits which have heretofore used the criteria spelled out in *Anderson v. Creighton, supra.* For example, in a case arising in the Tenth Circuit Court of Appeals, the Court granted qualified immunity to police officers on Plaintiff's claim of violation of her right to substantive due process, where the officers had impounded a car in which she had been a passenger and left her alone in a high crime area, where she was subsequently assaulted and raped. *Hilliard v. City & County of Denver,* 930 F.2d 1516, 1520-21, *cert. denied,* 112 S.Ct. 656 (1991). *See also, Freeman v. Ferguson,* 911 F.2d 52, 55 (CA8 1990) (noting that the law is unclear as to "how large a role the state must play in the creation of danger and in the creation of the vulnerability" before it assumes a corresponding constitutional duty to protect); *McKee v. City of Rockwell,* 877 F.2d 409, 414 (CA5 1989) (noting that "This is the lesson of *DeShaney*: that law enforcement officers have authority to act does not imply that they have any constitutional duty to act.").

Even within the Sixth Circuit there remains conflicting authority and uncertainty as to the contours of the law of substantive due process arising from a police officer's alleged failure to protect or prevent someone from suffering injury from private violence. In *Walton v. City of Southfield*, 995 F.2d 1331 (CA6 1993), the Sixth Circuit Court of Appeals granted qualified immunity to police officers who left two minor children unattended on the road while they brought the adult driver into the police station, holding that the law addressing constitutional liability for a state actor's alleged failure to protect, was not clearly established.[2] Similarly, in *Foy, supra*, the Court acknowledged that the contours of a person's right to be free from alleged state facilitation of indirect harm remains unclear, even to the judiciary, stating as follows:

> Neither the Supreme Court nor this court has announced a clearly established right of persons not in custody or incarcerated to recover for a substantive due process violation because the police permitted them to go on their way after a brief encounter.

Foy, 58 F.3d at 232.

It is clear, after examination of the conflicting opinions within the Sixth Circuit, as well as those among the other Circuits, that the contours of the law governing a police officer's liability under Section 1983 for allowing a

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[2] In contrast to the Sixth Circuit's opinion in *Walton, supra*, granting qualified immunity, is the conflicting holding in *Wood v. Ostrander*, 879 F.2d 583 (CA9 1989), in which the Ninth Circuit denied qualified immunity to a police officer who, after arresting a driver, left the female passenger abandoned in the vehicle to fend for herself in a crime-ridden area.

person to come to harm by a third party, remains undefined, and is not clearly established. Certainly it was not clearly established in 1994, the time of the incident involving Black. The Sixth Circuit has redefined qualified immunity as it is recognized through Supreme Court precedent, and has in effect thwarted its very purpose of being applicable when the law is not clearly established.

II.

THE SIXTH CIRCUIT'S ENUNCIATION OF "DELIBERATE INDIFFERENCE" AS A "KNEW OR REASONABLY SHOULD HAVE KNOWN" STANDARD CONVERTS AN ORDINARY NEGLIGENCE ACTION INTO A CONSTITUTIONAL CLAIM IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT.

A. CONFLICT WITH THE UNITED STATES SUPREME COURT

In the case below, the Sixth Circuit held:

> In cases in which a plaintiff alleges an injury arising out of the state's custody over her, the deliberate indifference test ensures that the injuries arising out of truly arbitrary governmental action are compensated, while at the same time avoiding the imposition on to the states of a broad, federalized system of tort law. We therefore re-affirm the application of that test today.
>
> We again note that the district court erred in holding that the entire field of substantive due process law regarding state liability for indirect injury was not clearly established in 1994. *See Chipman*, 858 F.Supp. at 90. Although the discussion above reveals that there is obviously considerable uncertainty at the margin, the core

> principle that the state must not act with deliberate indifference to the risk of injury to persons in its custody is well-established. In the present case, we believe that Black's complaint, as well as the record evidence read in the light most favorable to her, supports a claim that the defendant officers acted with deliberate indifference to the threat of injury to her. *They knew, or reasonably should have known, that Kritis was unfit to drive. They knew, or reasonably should have known, that Kritis had assaulted her earlier in the evening and had threatened to hurt her. Nevertheless, they chose to act affirmatively to place her in harm's way.* (Appendix, *infra*, pp. 1a-45a) (Emphasis added).

Stemler, 126 F.3d at 870.

All of the claims against the officers were dismissed by the District Court pursuant to a FRCP 12(b)(6) Motion to Dismiss. An appellate review of such a dismissal is limited to consideration of the allegations contained in the Complaint. *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Rather than confining itself to the allegations in the Complaint and Amended Complaint, the Sixth Circuit relied heavily on the "record" evidence before it solely to support the summary judgments issued by the District Court on other claims, not for the purpose of review of the 12(b)(6) dismissal. (Appendix, *infra*, pp. 65a-81a). Following the impermissible consideration of this "record" evidence, the Sixth Circuit substituted the classic ordinary negligence standard of "knew or reasonably should have known" for the applicable deliberate indifference test, thus converting Chipman's §1983 substantive due process claim into a state law tort claim, in direct conflict with this Court's holding in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970,

128 L.Ed.2d 811 (1994); *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986); and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

Mere negligence does not equate to "deliberate indifference." *Wilson v. Seiter*, 501 U.S. at 305, 111 S.Ct. at ___. This Court has consistently held that the due process clause "does not purport to supplant traditional tort law by creating liability for commonplace injuries, indeed finding a constitutional claim from such facts trivializes due process." *Daniels v. Williams*, 474 U.S. at 332, 106 S.Ct. at ___. The Supreme Court has repeatedly declared its unwillingness to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already have been administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-61, 47 L.Ed.2d 405 (1976); *Daniels v. Williams*, 474 U.S. at 332; *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420 (1981). "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), *citing Collins v. Harker Heights*, 503 U.S. at 125, 112 S.Ct. 1061, 1068 (1992).

In *Farmer v. Brennan*, this Court defined "deliberate indifference" as requiring "a showing that the official was

subjectively aware of the risk." *Farmer v. Brennan, supra,* 511 U.S. at ___, 114 S.Ct. at 1974. In *Farmer v. Brennan,* this Court granted certiorari:

> [B]ecause Courts of Appeals had adopted inconsistent tests for "deliberate indifference." *Compare, for example, McGill v. Duckworth,* 944 F.2d 344, 348 (CA7 1991) (holding that "deliberate indifference" requires a "subjective standard of recklessness"), *cert. denied* 503 U.S. ___, 112 S.Ct. 1265, 117 L.Ed.2d 493 (1992), *Young v. Quinlan,* 960 F.2d 351, 360-361 (CA3 1992) (*"[A] prison official is deliberately indifferent when he knows or should have known of sufficiently serious danger to an inmate"*). (Emphasis added).

Id. at 1976.

Faced with such conflicts throughout the Courts of Appeals, the Supreme Court settled, once and for all, "that deliberate indifference describes a state of mind more blameworthy than negligence . . . " 511 U.S. at ___, 114 S.Ct. at 1978. The Sixth Circuit's definition plainly and undeniably runs counter to this pronouncement.

In the case below, the Sixth Circuit ignored the clear import of this precedent in ruling that the officers "knew or reasonably should have known" that they might be placing Black in "harm's way" and that such conduct rises to the level of deliberate indifference, sufficient to support a substantive due process cause of action. In application, the Sixth Circuit has made deliberate indifference synonymous with ordinary negligence, transposing a simple tort claim into a cognizable constitutional cause of action. If allowed to stand, this decision will create a new and greatly expanded field of federal tort law under the guise of constitutional due process. As recognized by the Supreme Court, this is a dangerous

road to travel and is in direct conflict with Supreme Court precedent. There is no realistic prospect for a resolution of this far reaching conflict without a decision from this Court.

B. CONFLICT AMONG THE OTHER CIRCUITS.

A review of the case law reveals that in the wake of *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) and *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) there is still a conflict among the circuits. While it is clear in all circuits, except for the Sixth and Second Circuits, that negligence is not sufficient as a degree of culpability to establish a due process violation, some circuits still embrace the concept of gross negligence as a standard for deliberate indifference.

At the extreme end of the spectrum is the Second Circuit, which has adopted an ordinary negligence standard when analyzing deliberate indifference. In *Liscio v. Warren*, 901 F.2d 274 (CA2 1990), the Second Circuit defined deliberate indifference as requiring a determination of what the official "knew or should have known". *Id.* at 276-77.

In stark contrast to the Second Circuit's approach is the decision in *Uhlrig v. Harder*, 64 F.3d 567 (CA10 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996), where the Tenth Circuit recognized that a defendant would have to "*act recklessly in conscious disregard*" of a "substantial risk of serious, immediate and proximate harm". (Emphasis added). Furthermore, the Tenth Circuit's approach requires that the defendant **actually**

intend to expose the Plaintiff to a risk of serious, immediate and proximate harm **without regard to the consequences to the Plaintiff**. *Id.* at 573-74.

Likewise, the Seventh Circuit requires that the defendant be aware that the plaintiff was in serious risk of harm, but nevertheless made a conscious decision not to prevent the harm from occurring. *See West v. Waymire*, 114 F.3d 646 (CA7 1997).

The First Circuit requires that the defendant possess a culpable state of mind and a wanton intention to inflict pain on the plaintiff before finding deliberate indifference exists. *Manarite v. City of Springfield*, 957 F.2d 953 (CA1 1992), *cert. denied*, 506 U.S. 837, 113 S.Ct. 113, 121 L.Ed.2d 70 (1992).

In the Eighth Circuit, a lack of due care by an official causing unintended injury to life, liberty or property does not implicate the due process clause. *Davis v. Fulton County*, 90 F.3d 1346 (CA8 1996). This is also similar to the Fifth Circuit's approach. *Salas v. Carpenter*, 980 F.2d 299 (CA5 1992).

These decisions demonstrate that there is conflict among the circuits regarding application and interpretation of the deliberate indifference standard. The Sixth Circuit's decision below, adopting a simple negligence standard, conflicts with all but the Second Circuit. This split from the other circuits can only lead to confusion as district courts attempt to grapple with this issue. At this point, a decision from the Supreme Court is needed to clarify the definition of deliberate indifference in the context of a Fourteenth Amendment substantive due process claim.

C. CONFLICT WITHIN THE SIXTH CIRCUIT.

The opinion below also creates a conflict within the Sixth Circuit, sending a mixed message which promises to fuel disarray and confusion among the district courts and litigants within the Circuit.

In *Nishiyama v. Dickson County*, 814 F.2d 277 (CA6 1987) (En banc), a case decided prior to *DeShaney* and *Collins v. Harker Heights*, parents of a daughter, who was killed by an inmate driving an official patrol car with authorization from the sheriff, brought a §1983 action against the sheriff and the county based on a theory of gross negligence. The Sixth Circuit concluded that the allegation of gross negligence was "sufficient to charge [the defendants] with arbitrary use of governmental power" in violation of the Due Process Clause. *Id.* at 282. The test articulated in *Nishiyama* was whether the defendant official "intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow." *Id.*

However, after the Supreme Court issued its decisions in *DeShaney v. Winnebago County Dept. of Social Services, supra*, and *Collins v. Harker Heights, supra*, the Sixth Circuit in *Lewellen v. Nashville*, 34 F.3d 345 (CA6 1994) all but expressly overruled its holding in *Nishiyama*. Specifically, the Court stated:

> Accordingly, as we had occasion to observe in *Nobles v. Brown*, 985 F.2d 235, 238 n.1 (6th Cir. 1992), the test we applied in *Nishiyama* to determine whether the defendants' conduct was actionable under §1983 "may not have survived

> the Supreme Court's subsequent decision in *DeShaney*."
>
> Be that as it may, and regardless of whether the result we reached in *Nishiyama* could be justified under current Supreme Court doctrine, it seems clear that if *Nishiyama* had come before us after the Supreme Court issued its decision in *Collins v. Harker Heights*, we would have had to use a test other than the one we did use. *Nishiyama's* test of a substantive due process violation, relying as it does on an explication of the standard for a particular type of "gross negligence," simply cannot be reconciled with what the Supreme Court said in *Harker Heights*.

Id. at 349-50.

In the case below, the Sixth Circuit has impermissibly retreated to its rationale articulated in *Nishiyama*, a pre-*DeShaney* decision, and has revitalized ordinary negligence as the standard to be used in determining deliberate indifference. This approach is in complete derogation of established precedent within the Sixth Circuit itself, as well as that of the Supreme Court.

III.

BY REFUSING TO GIVE PRECLUSIVE EFFECT TO A STATE COURT JUDGMENT WHICH ADJUDICATED THE ISSUES OF THE EXISTENCE OF A SPECIAL RELATIONSHIP AND CAUSATION, THE SIXTH CIRCUIT DECISION CONFLICTS WITH ESTABLISHED SUPREME COURT PRECEDENT WHICH RECOGNIZES PRINCIPLES OF *RES JUDICATA* AND THE CONCEPT OF COMITY BETWEEN FEDERAL AND STATE COURTS

It is truly ironic that the Sixth Circuit superimposed an ordinary negligence standard onto a Section 1983

claim to create a constitutional tort, as discussed in the above argument, and then having done so, ignored the prior adjudication made by a state court on the underlying negligence claim. Despite the fact that the findings necessary to establish a special relationship between Black and the officers were specifically addressed and disposed of in the companion state court case, the Sixth Circuit chose to ignore the adjudicated facts of the state court, and improperly reinstated the federal action against the officers.

The Sixth Circuit acknowledged, and it is undisputed, that the state court made the following specific findings of fact: *that Black was neither in custody nor otherwise restrained at the time of the accident; nor was the violence which caused her death perpetrated by a state actor.* Significant to the *DeShaney, supra,* analysis, the Boone County Circuit Court specifically found that:

> There is no evidence from which it can be concluded that Black was in custody or restrained by the state at the time the pick-up truck struck the guardrail. Further, there is no evidence to support a claim that the conduct which caused the pick-up to leave the roadway and strike the guardrail was perpetrated by any of the Defendants or any other 'state actor'.

(Appendix, *infra,* p. 85a).

The Sixth Circuit acknowledged that the factual findings of the Boone County Circuit Court were entitled to preclusive effect, but then inexplicably dismissed these findings as being irrelevant to the Section 1983 substantive due process analysis. *See Stemler v. City of Florence,* 126 F.3d at 870, n.12.

Causation, however, is essential in any §1983 claim. There must be a direct relationship between the perceived constitutional violation and the alleged harm in order for the actions of the state actors to be actionable under §1983. *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1970). In the case at bar, Chipman contends that the officers unconstitutionally deprived Black of her liberty by placing her into the vehicle driven by Kritis, and that the alleged resultant injury was her death. The Sixth Circuit seized upon this theory, and reinstated Chipman's Complaint to allow him to *re-litigate* in a new forum, the allegations that the officers somehow coerced Black into Kritis' vehicle, whether by their alleged actions or alleged threats. By doing so, the Sixth Circuit *ignored* the prior specific findings of the Boone County Circuit Court which found no causal connection between the state actors' alleged actions and Black's death. The state court's entry of Summary Judgment on Chipman's claims was relevant to, and dispositive of, the issue before the Sixth Circuit as to whether he could relitigate the issue of Black's alleged custody, and the causal connection between the officers' alleged actions and her death.

The Boone County Circuit Court's Summary Judgment specifically addressed the touchstone of this case – namely, did the facts surrounding the officers' actions toward Black, create a "special relationship", such that the officers owed her a duty of care to prevent her from suffering harm by a third party. Although the state court analysis of the existence of a special relationship was in the context of Chipman's negligence action, Kentucky has for the purpose of tort law, adopted the same two-prong special relationship test established in those federal cases

decided since the Supreme Court's decision in *DeShaney*. *Ashby v. City of Louisville*, 841 S.W.2d 184 (Ky. App. 1992), *citing Dawson v. Milwaukee Housing Authority*, 930 F.2d 1983 (CA7 1991); *Brown v. Grabowski*, 922 F.2d 1097 (CA3 1990); *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696 (CA9 1990); *Philadelphia Police and Fire Association for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156 (CA3 1989); *Hynson v. City of Chester*, 731 F.Supp. 1236 (E.D. Pa. 1990); *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995). **Thus, in order for a special relationship to exist between a plaintiff and a state actor, under both Kentucky tort law, and Federal Section 1983 law, it must be shown first that the victim was in government custody or otherwise restrained at the time of the injury, and that the complained of violence was perpetrated by a government actor. *Ashby*, 841 S.W.2d at 190; *DeShaney*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249.**

In the case at bar, the Boone County Circuit Court made specific findings that neither of the two elements necessary to establish a special relationship existed. The Sixth Circuit however, by dismissing these findings as being irrelevant, has reinstated the federal action, and allowed Chipman to try and prove those allegations which he was unsuccessful in proving in the earlier state court proceeding before the Boone County Circuit Court.

The Sixth Circuit's refusal to apply the doctrine of *res judicata* to the facts already adjudicated in the companion state court case is in direct contradiction to established Supreme Court precedent. In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court held that issues and facts resolved in a companion state court action are entitled to preclusive effect in a

subsequent §1983 action brought in federal court. In so holding, the Supreme Court emphasized that application of principles of *res judicata* and collateral estoppel not only reduce unnecessary litigation, and foster reliance upon adjudication, but these principles also promote "the comity between state and federal courts that has been recognized as a bulwark of the federal system". *Allen v. McCurry*, 449 U.S. at 95, 101 S.Ct. at ___, *citing*, *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Inconsistent judgments, findings, and/or prolonged litigation are the inevitable consequences of the Sixth Circuit's refusal to give preclusive effect to the findings of the Boone County Circuit Court. In fact, closer examination of the decision shows that in order to reinstate the Chipman Complaint, the Sixth Circuit improperly extended its review beyond the boundaries of the pleadings, and summarily made factual findings of its own, which are inconsistent with those found in the state court adjudication. Upon remand, the federal district court, in deciding which facts remain to be tried, is left with the impossible task of reconciling two different fact findings – one, being a state court adjudication, and the other, an appellate review of a FRCP 12(b)(6) Motion to Dismiss – on the core issues of this case, namely: whether Black was ever "in custody"; whether a special relationship existed between the officers and Black; and whether there existed a causal connection between the alleged custody and Black's ultimate death. This scenario represents precisely the type of inconsistent adjudication and prolonged litigation which the Supreme Court in *Allen v. McCurry, supra*, sought to avoid. Thus, the Sixth Circuit's deviation from established Supreme Court precedent governing

principles of *res judicata* and comity warrants review by a grant of certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN STEMLER, *Plaintiff-Appellant,* v. CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; and JOHN DOLAN, *Defendants-Appelles.*	)	No. 96-5993
WILLIAM CHIPMAN, Administrator of the Estate of Conni Black, *Plaintiff-Appellant,* v. CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; JOHN DOLAN; RON KENNER, Boone County Sheriff; ROB REUTHE; and CHRIS ALSIP, *Defendants-Appellees.*	)	No. 96-5996

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
Nos. 95-00014, 94-00062 – William O. Bertelsman,
District Judge.

Argued: August 1, 1997

Decided and Filed: October 8, 1997

Before: MERRITT, WELLFORD, and BOGGS,
Circuit Judges.

COUNSEL

ARGUED: Eric C. Deters, Richard G. Meyer, DETERS, BENZINGER & LAVELLE, Covington, Kentucky, for Appellant. Jeffrey C. Mando, ADAMS, BROOKING, STEPNER, WOLTERMANN & DUSING, Covington, Kentucky, for Appellee. **ON BRIEF:** Eric C. Deters, Richard G. Meyer, DETERS, BENZINGER & LAVELLE, Covington, Kentucky, for Appellant. Jeffrey C. Mando, ADAMS, BROOKING, STEPNER, WOLTERMANN & DUSING, Covington, Kentucky, R. Kent Westberry, David Whalin, LANDRUM & SHOUSE, Louisville, Kentucky, Hugh O. Skees, ROUSE, SKEES, WILSON & DILLON, Florence, Kentucky, W. Kenneth Nevitt, R. Thaddeus Keal, WILLIAMS & WAGONER, Louisville, Kentucky, for Appellee.

BOGGS, J., delivered the opinion of the court, in which MERRITT, J., joined. WELLFORD, J. (pp. 35-38), delivered a separate concurring opinion.

OPINION

BOGGS, Circuit Judge. In No. 96-5996, the estate of Conni Black (hereinafter "Black") appeals the judgment entered against her on her substantive due process claim against officers of Boone County, Kentucky, and of the City of Florence arising from her death in a car accident on the night of February 18, 1994, shortly after those officers removed her from the car of Susan Stemler and placed her in the truck of her drunk and violently abusive boyfriend, Steve Kritis. In No. 96-5993, Stemler appeals the judgment entered against her on her claims of false

arrest, malicious prosecution, and violation of equal protection arising from her arrest at that time for driving under the influence; she alleges that the officers arrested her solely because they believed her to be a lesbian. For the reasons explained herein, with respect to both plaintiffs, we affirm the district court's award of summary judgment to the City of Florence and to the Boone County defendants in their official capacities. However, we reverse the dismissal of Black's complaint against the individual officers, and we also reverse the dismissal of Stemler's complaint against the individual officers with respect to her equal protection claim.

I. Background

A. The Assaults and Car Chase

On February 18, 1994, at about 10:45 p.m., Conni Black and her boyfriend, Steve Kritis, arrived at Willie's Saloon in the Ramada Inn in Florence, Kentucky.[1] Both Black and Kritis had been drinking heavily. While line dancing, Black met Susan Stemler. Around 2:00 a.m., the two went to the women's restroom and discussed problems that each had with their respective boyfriends. During this conversation, Black told Stemler that she wanted

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[1] The procedural postures of these cases are somewhat odd, since in both cases we are presented with an appeal from a dismissal under Rule 12(b)(6) with respect to some defendants and an appeal from summary judgment with respect to other defendants. Except where otherwise noted, this opinion will discuss the record evidence viewed in the light most favorable to the appellants.

to leave Kritis. According to one witness, Christine Stillwell:

> Steve Kritis then burst into the restroom and slung the door to the restroom hard. He came into the restroom yelling. He stated in part: "If you don't get your fucking sister out of here, I'll kill the bitch." He yelled this at Laura Stemler.
>
> He grabbed Conni Black on the arm as he screamed at her. He slammed her against a toilet stall. He then yanked her out of the restroom. After he left the restroom, I could still hear him screaming outside of the restroom. . . . Conni came back into the restroom. He yanked her out physically of the restroom a second time.
>
> At this point, I wondered why nobody had called the police. When I went out of the restroom and into the lobby of the Ramada, I observed Kritis pushing Conni around in the parking lot. As I went outside into the parking lot, I observed Kritis still pushing Conni. . . .
>
> Kritis put his forehead against Conni's and put his hands behind his back. For every step Conni took to flee Kritis, Kritis took one forward still pressing his forehead against hers. He then made a fist to hit her. He looked at me and saw that I was watching and released his fist.

According to Stemler, after Kritis removed Black from the restroom, Kritis slammed Black against a concrete wall in the hotel lobby; Black's head hit the wall and she briefly passed out. Black asked Stemler to drive her home, and Stemler agreed. As they were leaving, Kritis struck Stemler in the back of the head with a blunt object. Stemler and Black got into Stemler's car and drove away

at about 2:15 a.m. Kritis pursued them in his truck. Kritis did not have his headlights on. At one point during the chase, Kritis rear-ended Stemler's car with his truck in an attempt to make her car stop. A witness, Terry Barker, was driving east on U.S. 42 in Florence at the time; he saw that Kritis was chasing the women and that the women were in obvious distress, and decided to follow the vehicles.

According to Barker, at one point the truck got ahead of the car and forced it down Woodland Avenue, which ends in a cul-de-sac. Stemler pulled her car into a driveway, and Kritis stopped his car behind her to block her access to the street. Fortunately, the driveway belonged to William Minnick, a retired Florence police officer. His wife, Nancy Minnick, heard a horn blowing at about 2:30 a.m. When she opened her door, she saw Kritis standing in her driveway on the passenger side of the car. Kritis was hitting the car window and yelling. The car backed out around the truck and drove up the street. Kritis jumped in the car and again gave chase; according to Barker, he was driving at about sixty miles per hour on the sidewalk of the residential street. By this point, Mr. Minnick was awake and dressed; he called 911, and then got in his car and followed Kritis and Stemler. Barker also continued to follow them.

B. The Police Stop

After the vehicles pulled back on to U.S. 42, they stopped at a light at Tanners Lane. Barker flashed his lights to alert a nearby police officer, defendant Lieutenant Thomas Dusing, an officer of the Florence Police

Department, who was responding to the 911 call. When Dusing pulled up to Barker, Barker informed him that there was a "serious problem" with the two vehicles ahead of him, and that Kritis appeared to be a threat to the safety of the two women. After speaking with Barker, Dusing pulled his cruiser in front of Stemler's car and Kritis's truck at the intersection. As he left the cruiser, Stemler jumped out of her car and ran to him. Stemler told Dusing that Kritis was drunk, that he had assaulted both her and Black, that he had threatened to kill her, and that he had placed both of them in danger by chasing after them at high speed. She was obviously emotionally distraught, and cried while she related the evening's events to Dusing. While Dusing spoke with Stemler, four other officers arrived at the scene in separate cars: officers Bobby Joe Wince and John Dolan of the Florence Police Department, and officers Rob Reuthe and Chris Alsip of the Boone County Sheriff's Office. Each of the four would later be named as defendants in this litigation along with Dusing.

During Stemler's conversation with Dusing, Reuthe approached Kritis, who was seated in his truck. According to Reuthe's testimony, Kritis told him that Stemler was a lesbian,[2] and that she was kidnapping his girlfriend. After speaking with Stemler, Dusing approached Reuthe; Dusing would later testify that Reuthe told him at that time that Stemler was a lesbian. Reuthe also told Dusing that Kritis smelled of alcohol, but that he had not tested Kritis for intoxication. Dusing then approached Kritis, who repeated his assertion that Stemler was a

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[2] Stemler denies that she is a lesbian.

lesbian. Kritis also asked Dusing to bring Black to his truck; Dusing told him that he would see what he could do. Dusing asked Kritis whether he had seen Stemler driving the car, and whether he would be willing to testify against Stemler.

Dusing would later submit a police report claiming that he did not smell alcohol on Kritis's breath at that time. This claim is contrary to his contemporaneous statements to Wince and to Mr. Minnick that Kritis smelled of alcohol. A blood test taken over two hours later would reveal that Kritis had a blood alcohol level of .115, which indicates that at the time of the police stop, his blood alcohol level was probably between .155 and .175, at least one-and-a-half times the legal limit in Kentucky of .10.[3] Subsequent observers would also testify that, over an hour after the police stop, it was immediately apparent that Kritis was very drunk. Nevertheless, neither Dusing nor any other officer ever tested Kritis for intoxication, or even asked him to step out of the truck.

At some point, Dusing asked Wince to test Stemler for intoxication. By that time, Wince had already heard Kritis's allegation that Stemler was a lesbian. Wince did not find any of the standard DUI indicators in examining Stemler; she did not have affected speech, impaired balance, impaired walking, or impaired coordination, and she did not seem disoriented. According to Wince, Stemler failed the horizontal nystagmus gaze field test, a test in which uncontrolled movement in a suspect's eyes may

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[3] Both Black's complaint and Stemler's complaint allege that Kritis's blood alcohol level at the time of the police stop was .20.

indicate drunkenness. However, Stemler alleges that Wince did not know how to perform that test properly, and had to ask for assistance with the test from Dolan. Stemler alleges further that Dolan also did not know how to perform the nystagmus test. Wince testified that the breathalyzer revealed a blood alcohol level of .105.[4] Stemler alleges that the breathalyzer was not properly calibrated.

After performing the field tests, Wince conferred with Dusing and Dolan. By this time, all three officers had heard Kritis's claim that Stemler was a lesbian. Dusing decided that they should arrest Stemler for driving under the influence, and the other officers agreed. Dusing would later concede that, in deciding to arrest Stemler and not Kritis, he relied on Kritis's version of events more than he did Stemler's. Wince approached Stemler, informed her that she was under arrest, and asked her who she would like to tow her car. Stemler broke into tears, pointed at Kritis, and asked Wince, "Aren't you going to check him? Why don't you check him?" As she was pointing, Wince grabbed her arm, pulled it behind her, and placed her in handcuffs.[5]

At approximately the same time, two unknown officers, one each from Florence and from Boone County, approached Barker, who was parked across the street.

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[4] Stemler's complaint alleges that she had a blood alcohol level below .10 at the time of the police stop.

[5] In her complaint, Stemler alleges that Wince used excessive force in handcuffing her. The district court denied Wince's motion to dismiss this claim; however, Stemler has voluntarily dismissed her excessive force claim.

Barker related the complete story of the chase to both officers. Barker overheard one of the officers relating his story to a third officer. The officers asked him whether he saw Stemler driving the car, and whether he would be willing to testify against Stemler in court. Upon learning that Stemler was being placed under arrest, Barker told the officers that they were arresting the wrong person and that Kritis was obviously "crazy"; the officers didn't appreciate that, became "arrogant," and told him that he didn't "know what's going on" and that he could "go on about your business." Barker was dumbfounded and angered by the officers' actions. Barker confirms that the police never asked Kritis to leave the truck, despite the fact that, as during the chase, Kritis still had not turned his headlights on. Although the officers told Barker that they would contact him to be a witness against Stemler, they never did so. Furthermore, Wince failed to list Barker as a witness at the scene in his field notes, and the card on which the officers supposedly were writing down Barker's name and telephone number was lost.

While Wince was testing Stemler for intoxication, Mr. Minnick arrived at the scene. He spoke first with defendant Boone County Officer Chris Alsip. Alsip immediately "informed" him that Stemler was a lesbian. Minnick thought that it was odd that Alsip could state that fact with such certainty, given that Stemler had out-of-state license plates. Wince also made a point of informing Minnick that Stemler was a lesbian. Although the officers at the police stop were aware that Minnick had observed Kritis chasing Stemler, they asked him only whether they observed Stemler driving her car.

Dusing ordered Dolan to approach Black, who was still in the passenger seat of Stemler's car, and to inform her that she would be arrested for public intoxication "if she didn't want to leave with the male." At that time, Black was very intoxicated; her eyes were glassy and she slurred her words. Alsip and Dolan lifted her out of the car and assisted her to Kritis's truck. Black stumbled as she walked to the truck. Alsip physically placed her into the passenger seat in the truck. Alsip would later admit that he never heard Black say that she wanted to leave with Kritis.[6] Dusing told Alsip only that Stemler was a lesbian and that Kritis did not want his girlfriend with her; Alsip would later concede that, if he had known of all the preceding events that evening, he would not have placed Black in the truck but instead would have arrested Kritis.

C. *The Subsequent Accident*

As soon as Black was in the truck, at about 3:00 a.m., Kritis drove away. Kritis drove two blocks from the police

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[6] Black's complaint alleges that, "having lost the assistance of Susan Stemler, under threat of arrest and against her will," she capitulated and allowed herself to be placed into Kritis's truck. Dolan testified that Black asked if she could leave with Kritis; however, Black's estate argues that Dolan had an incentive to be untruthful on this point, and that the issue of his veracity should be reserved for the factfinder. Given the officers' admissions that Dusing ordered Dolan to threaten Black with arrest, and Black's earlier unwillingness to leave with Kritis, a view of the evidence most favorable to Black would indicate that she involuntarily left the scene of the police stop with Kritis.

stop and then turned onto the northbound lanes of I-75. Black had passed out in the truck. According to Kritis, when she woke up, she "went haywire" and began hitting him; he hit her back and lost control of the truck. The truck swerved to the right and collided side-to-side with a guardrail. The impact threw Black partially out of the passenger side window. Black's arm was completely severed from her body and her head was severed into two parts. The truck was damaged and the front tire was blown. Kritis continued to drive slowly on I-75 and then east on I-275 until the truck could proceed no further.

A passing motorist, Kristopher Waldespuhl, was waved down by Kritis around 3:45 a.m. Kritis said, "my girlfriend is kind of hurt," and asked for help. According to Waldespuhl, Kritis spoke "very nonchalantly," and "had no emotions at all, wasn't upset." It was immediately obvious to Waldespuhl that Kritis was drunk; Kritis had alcohol on his breath, his eyes were glazed and bloodshot, and he was not acting sober. Kritis admitted to Waldespuhl that he was drunk. He also told Waldespuhl that "they were fighting at Willie's and some dyke bitch took her from me." Waldespuhl walked over to the other side of the truck. It was immediately apparent to Waldespuhl that Black was dead, although Kritis was unaware of this fact. Waldespuhl left to place a 911 call.

Officer Stephen Johnson of the Lakeside Park-Crestview Police Department arrived at the scene. It was obvious to Johnson that Kritis was drunk; he did not even need to conduct a field sobriety test to determine that he had probable cause to arrest Kritis. Another officer at the scene, Mike Mann, also immediately determined that Kritis was drunk. According to Mann, "Steve Kritis told

me that he and his girlfriend were fighting and exchanging blows. He stated that he felt a large 'thud' but continued driving the truck. His truck started to quit and he pulled over." Johnson placed Kritis under arrest for driving under the influence at 4:30 a.m.[7]

An accident reconstruction specialist, Detective Jack Prindle, determined that, at the time of the impact with the guardrail, the truck was traveling at sixty-six miles per hour. The truck had traveled from the scene of the police stop to the scene of the accident in about five minutes. The accident occurred when the steering wheel turned abruptly to the right; there is no way to know what caused the wheel to turn. As the vehicle struck the guardrail, Black was partially ejected, causing her head and right arm to be severed on the guardrail. Kritis continued on for 2.5 miles before stopping.

D. Stemler's Prosecution

After arresting Stemler, Wince took her for a blood test. Stemler claims that she had had only a half-glass of beer and two Irish coffees over the course of the night. She suspects that the officers tampered with her blood sample, which allegedly revealed a .17 blood alcohol level an hour after the breathalyzer allegedly revealed a .105 blood alcohol level. Wince handled her blood sample

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[7] Kritis would subsequently plead guilty in the Boone County District Court to manslaughter in the second degree and to wanton endangerment in the first degree. He was sentenced only to probation. After violating the terms of his probation, he is now serving a five-year prison sentence.

after he learned that Black had died. Larry Dehus, a "forensic scientist," reviewed the specimens and the timing of the tests and concluded that the sample's integrity had been destroyed, given that Wince waited five days to deliver the sample and that there were no procedures to guard against tampering. When a blood sample is submitted to the detective's office of the Florence Police Department, the clerk of that office, Mary Hayes, is supposed to receive a property card and an evidence tag; Hayes never received either with respect to Stemler's blood sample. This was a violation of department policy. Stemler's sample was the only sample that Wince had ever kept in the Florence Police Department refrigerator for five days in his career, and was also the only sample that he had ever personally driven to the lab. According to Officer Chester Snow, who supervised the property room, it would be "highly irregular" to keep a sample in the refrigerator for five days.

Stemler was prosecuted in the Boone County District Court for driving under the influence of alcohol. She defended the charge on the ground that the evidence against her had been fabricated. Dr. Gordon James testified at her trial that the handling of the blood sample was "arbitrary" and that the chain of custody had not been established. Her first trial resulted in a hung jury. She was retried. Although Wince claimed at Stemler's first DUI trial that he had not completed an evidence card, at the retrial he produced a completed card which neither Hayes nor Snow had ever seen. He claimed that he completed the card on February 19, at the time of the arrest; Hayes testified that if that were true, she should have seen the card. The second jury acquitted Stemler.

E. Related State Court Proceedings

On March 7, 1994, Black's estate filed a wrongful death action under Kentucky law against each of the defendants in this case in the Boone County Circuit Court. *Chipman v. Florence*, No. 94-CI-00202. Stemler also brought suit against the defendants herein in the Boone County Circuit Court, raising state-law claims of malicious prosecution, false arrest, abuse of process, assault and battery, false imprisonment and negligent or intentional infliction of emotional distress. *Stemler v. Florence*, No. 94-CI-00459. The state court consolidated the two suits, and in separate orders on April 2 and April 26, 1996, it awarded the defendants summary judgment on all claims except Stemler's assault and battery claim against Wince. Stemler voluntarily dismissed that claim. Both Black and Stemler have appealed the judgments against them, and their appeals are pending in the Kentucky Court of Appeals.

F. Proceedings Below

On March 31, 1994, William Chipman, the administrator of the estate of Conni Black, filed a complaint in the United States District Court for the Eastern District of Kentucky against Dusing, Dolan, Wince, Reuthe, and Alsip. The complaint also named the City of Florence and Ron Kenner, the Boone County Sheriff.[8] The complaint

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[8] The appellees have informed the court that Kenner died on May 11, 1997. The appellees should have informed the court at the same time of the identity of Kenner's successor. *See* FED.R.

alleged that the defendants were liable under 42 U.S.C. § 1983 for Black's wrongful death, insofar as the defendants had displayed deliberate indifference in placing her in the car in which she was later killed. On August 2, 1994, the district court granted the individual officers' motions to dismiss under FED. R. CIV. P. 12(b)(6) on the ground of qualified immunity. *Chipman v. City of Florence*, 858 F. Supp. 87 (E.D. Ky. 1994), *reconsideration denied on amended complaint*, 866 F. Supp. 332 (E.D. Ky. 1994). On July 3, 1996, the district court granted the City of Florence's and Boone County's motions for summary judgment. Black now appeals, and her appeal is pending under docket number 96-5996.

On January 24, 1995, Susan Stemler filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Kentucky against Wince, Dusing, Dolan, and the City of Florence. The complaint alleged claims of excessive force, wrongful arrest, malicious prosecution, and violation of equal protection on the bases of sex and sexual orientation. On October 6, 1995, the district court granted the individual officers' motion to dismiss on grounds of qualified immunity. On July 3, 1996, after consolidating Stemler's case with Black's, the district court awarded summary judgment to the City of Florence. Stemler now appeals both orders, and her appeal is docketed in this court as No. 96-5993.

APP. P. 43(c). Since Black sued Kenner only in his official capacity as Boone County sheriff, for the purposes of this appeal we will treat the claims against him and the other Boone County defendants in their official capacities as a suit directly against Boone County.

We have consolidated the two appeals for consideration. We will consider first both plaintiffs' claims against the municipal defendants, then Black's claims against the individual officers, and finally Stemler's claims against the individual officers.

II. Municipal Liability Under § 1983

We may easily dispose of the claims against the City of Florence and Boone County. While a municipality may be held liable under 42 U.S.C. § 1983 for a constitutional violation directly attributable to it, § 1983 does not impose vicarious liability on a municipality for the constitutional torts of its employees. *See Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658, 692 (1978). Therefore, in order to state a claim against a city or a county under § 1983, a plaintiff must show that his injury was caused by an unconstitutional "policy" or "custom" of the municipality. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). The plaintiffs both assert that they were injured by the municipalities' allegedly deficient training programs. Where, as here, the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Board of County Comm'rs of Bryan County v. Brown*, 117 S.Ct. 1382, 1390 (1997) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 117 S.Ct. at 1391. In other words, the risk of a constitutional violation arising

as a result of the inadequacies in the municipal policy must be "plainly obvious." *Id.* at 1393.

As noted above, in the present case, both Stemler and Black argue that the municipalities should be held liable as a result of their failure to train their officers adequately. Neither plaintiff has demonstrated that there is a genuine issue of material fact as to whether the training programs were adequate, or as to whether the city or the county acted with deliberate indifference to the risk of a constitutional violation. Officers of both the city and the county are required to attend the Basic Police Academy of the Kentucky Justice Cabinet Department of Criminal Justice Training. The academy is a 400-hour course in which officers are taught the elements of criminal offenses under Kentucky law, the definition of probable cause, and procedures for the handling of evidence. At the academy, officers are also taught how to ensure the safety of potential victims of domestic violence. In addition, both the city and the county require their officers to attend a forty-hour training class every year; this program also includes training as to the proper response to an allegation of domestic violence. Neither Stemler nor Black have identified any reason to believe that the training programs were inadequate in any way. Each argues only that the defendant officers lacked complete familiarity with their department's policy manuals; however, neither plaintiff asserts any reason to believe that the city or the county did not take proper steps to ensure that their officers knew and complied with their policies.

Furthermore, a plaintiff ordinarily cannot show that a municipality acted with deliberate indifference without

showing that the municipality was aware of prior unconstitutional actions of its employees and failed to respond. *See Brown*, 117 S.Ct. at 1390; *Canton*, 489 U.S. at 390-91. The plaintiffs are unable to identify any prior instances of misconduct in the Boone County Sheriff's Department. With respect to the City of Florence, they argue only that Wince had once had a sexual harassment complaint filed against him by a co-worker.[9] However, there is no indication that the city failed to respond appropriately to that complaint, or that because of that one complaint it should have been "plainly obvious" to the city that Wince would falsely arrest a woman solely on the basis of her perceived sexual orientation or force a woman against her will into the truck of a drunk and violently abusive man. Therefore, because the plaintiffs cannot show that either the city or the county acted with deliberate indifference to the risk of a constitutional tort, the award of summary judgment to the municipal defendants must be affirmed.

III. Black's Substantive Due Process Claim

A. Test for Qualified Immunity

We turn now to the merits of Black's claim against the individual officers. She alleges that the officers

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[9] During the course of discovery, Stemler was denied access to the defendants' personnel files. Instead, the magistrate judge conducted an in camera review of those files and determined that they did not contain relevant evidence. Stemler now claims that the magistrate judge erred and that the files may contain evidence of other incidents to which the City of Florence failed to respond. However, she has waived this claim by failing to appeal the magistrate judge's ruling to district court. *See* FED. R. CIV. P. 72(a).

violated her right to "substantive due process"[10] under the Fourteenth Amendment by forcing her to leave the scene of the police stop in Kritis's truck. In other words, her claim is that the officers deprived her of her liberty (and, ultimately, her life) without due process of law by threatening to arrest her if she did not leave with Kritis, and by physically placing her against her will in his truck. Because Black seeks to hold the officers liable in their individual capacities under 42 U.S.C. § 1983, she must show not only that the officers' actions were unconstitutional, but also that they should have known at that time that they were violating her rights. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> It is not necessary that the very action have [sic] been previously held unlawful but, given the

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[10] In contrast to procedural due process, which guarantees that individuals will be afforded fair procedures before they are deprived of life, liberty, or property, substantive due process protects individuals against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). *But cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (suggesting that non-textual constitutional claims would be better analyzed under the Privileges and Immunities Clause of the Fourteenth Amendment; "Familiarity breeds inattention; and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms – sort of like 'green pastel redness.' ").

> preexisting law, the unlawfulness of the conduct must have been apparent. In determining whether an official is entitled to qualified immunity, this court asks whether the law was clearly established at the time of the alleged action.

Barton v. Norrod, 106 F.3d 1289, 1293 (6th Cir. 1997) (citation omitted). In determining whether the officers should have known in February 1994 that their actions were unlawful, we look primarily to decisions of the Supreme Court, this court, and other courts within our circuit. *See Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992).

We review the district court's determination that the officers were entitled to qualified immunity *de novo*. *See Barton*, 106 F.3d at 1293. In the present case, the district court reviewed the relevant case law dealing with claims that state actors violated substantive due process by allowing individuals to become subject to an indirect harm, and found much of that law to be confused and in conflict. It then appeared to reason that, since the doctrine of substantive due process was unclear in its entirety, no such claim could ever survive a motion to dismiss on the ground of qualified immunity: "This inquiry shows that the law in this area is unclear and that not only would no reasonable police officer have known what duty was owed to the plaintiff under the facts alleged in this case, but even the Supreme Court is uncertain on the matter." *Chipman v. City of Florence*, 858 F. Supp. 87, 90 (E.D. Ky. 1994) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199 (1989)) (dismissing complaint); *see also Chipman*, 866 F. Supp. 332, 335 (E.D. Ky. 1994) (denying motion for reconsideration).

This was error. While, as we will see below, there is a good deal of uncertainty with regard to the precise contours of substantive due process, it does not follow that state actors are insulated from liability on all such claims, no matter what the underlying facts may be. The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation.[11] Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known in February 1994 that their actions violated that right.

B. Custody Establishes the Existence of a Duty

We therefore proceed to determine whether the individual officers violated law that was clearly established in February 1994 when they forced Black into Kritis's

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[11] An instructive parallel: the district court's theory is analogous to an attempt to strike down a statute as unconstitutionally vague on its face because the application of the statute is not clear at the margins. Such an attempt will be unavailing, since federal courts will consider a facial vagueness claim only if a statute is unconstitutionally vague in all possible applications. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). Similarly, the mere fact that a state actor may be entitled to qualified immunity on some claims under a particular constitutional theory because the law is unclear in some respects does not imply that he will be immune from any and all suits arising under that theory.

truck. When, as here, a plaintiff alleges that state actors violated substantive due process by placing her at risk of harm from a third party, the court is presented with two distinct, though interrelated inquiries. First, in order to find for the plaintiff, the court must conclude that the plaintiff and the state actors had a sufficiently direct relationship such that the defendants owed her a duty not to subject her to danger. Second, the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory.

With respect to the first question, while the state does not owe its citizens a constitutional duty to keep them from harm in all circumstances, it has been clearly established that such a duty will arise when the state has acted to deprive an individual of certain indicia of liberty:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (citation omitted); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (involuntarily committed mental patients have substantive due process right,

analogous to Eighth Amendment right of prisoners, to protection from harm). In the present case, Black's complaint alleges – and the record evidence could reasonably be read to show – that the officers threatened to arrest her if she did not leave in Kritis's truck, and they physically lifted her out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the "affirmative act of restraining [Black's] freedom to act on her [own] behalf," and consequently imposed upon themselves a duty to ensure that they were not placing her in danger. Their actions were, in the words of *DeShaney*, a restraint on Black's personal liberty, not a failure to act on her behalf. *See also Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992).

The defendants rely on *Foy v. City of Berea*, 58 F.3d 227 (6th Cir.1995), to argue that they did not infringe Black's liberty. In *Foy*, the plaintiff had been drinking in a dormitory with his friends. After receiving a complaint, the police came to the dormitory and told them, "Get in your car and get out of here or somebody is getting arrested." Although the police had told them only to leave the premises, the plaintiff and his friends then decided to take a lengthy drive from Berea, Kentucky, to Crestline, Ohio. Forty-five minutes into that journey, the driver crashed the car, killing Foy. This court held that the defendant police officers had not violated Foy's right to substantive due process, since there was no restraint on his liberty that had caused him to keep driving. *Id.* at 230. The defendants also rely on *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir.1993). In *Walton*, we held that police officers who had arrested the driver of a car, and who had abandoned in a nearby building the children

(ages 15 and 2) who were the passengers of that car – but who had never taken the children into their custody – were entitled to qualified immunity from a substantive due process challenge.

Neither case is apposite. In the present case, Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers. Unlike *Foy*, Black never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in effect ordered her to do so; her fatal accident occurred about five minutes after the truck left the police stop. Furthermore, unlike *Walton*, Black was in the custody of the defendant officers in the sense that they had affirmatively acted to deprive her of her liberty, rather than merely negligently refused to act to protect her. *See Walton*, 995 F.2d at 1336-37. In sum, neither *Foy* nor *Walton* did anything to alter the clear and simple rule that state actors owe a duty of care to those individuals of whom they deprive their liberty, and a reasonable jury could conclude that the officers had deprived Black of her liberty by placing her in the truck or by threatening her with an arrest that would have been unwarranted under Kentucky law. *See* Ky.Rev.Stat. § 222.202 (offense of public intoxication involves drinking in public or endangering one's self, other persons, or property).

While it is clear that the state owes a duty of care to an individual who has suffered a deprivation of liberty by the state – *e.g.*, an individual who has been in the state's custody – there is also dicta in *DeShaney* that suggests that the state may also owe a duty to individuals in non-custodial settings:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.

489 U.S. at 201. A number of courts have relied on this language to hold that the state may owe an individual a duty of care under substantive due process, even if the individual is not in the state's custody, if the state has created a risk of harm to the individual. *See Kneipp v. Tedder*, 95 F.3d 1199, 1206-09 (3d Cir.1996) (collecting cases). Our court has suggested in dicta that *DeShaney* stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir.1994). The defendants argue that this rule was not clearly established in February of 1994, and remains unclear today. We need not opine as to the circumstances under which a substantive due process claim in a non-custodial setting is possible, or as to whether that possibility had been clearly established in 1994. Under any definition of the term, Black was in the defendant officers' custody at the time she was forced into Kritis's truck. Because we, unlike the district court, believe that any uncertainty at the margins of the *DeShaney* test is not relevant to Black's claim, we hold that the defendants should have known under clearly established law that they owed Black a duty not to force her into harm's way.

C. *The Defendants Violated Their Duty to Black by Exhibiting Deliberate Indifference to Her Fate*

Our holding that the officers owed Black a duty of care does not end our inquiry, for we also must determine what duty of care they owed, and whether they breached that duty. Over the last decade, the Supreme Court and this court have gradually defined the level of culpability with which a state defendant must act in order to be held liable for a violation of substantive due process. In *Daniels v. Williams*, 474 U.S. 327, 334 n. 3 (1986), the Supreme Court held that an allegation of simple negligence would not be sufficient to support a due process claim, but reserved judgment as to whether an allegation of gross negligence would suffice. In *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir.1987) (en banc), this court answered that reserved question in the affirmative. In that case, the plaintiff had been killed by an inmate who stopped her by using a patrol car that he had been allowed to use by county officials despite repeated warnings. We held that the plaintiff had stated a substantive due process claim:

> [T]he allegation in the present complaint of gross negligence on the part of the defendants was sufficient to charge them with arbitrary use of government power. . . .
>
> [A] person may be said to act in such a way as to trigger a section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow.

Id. at 282.

This aspect of *Nishiyama* has since been further refined. In *Lewellen v. Metropolitan Gov't of Nashville & Davidson County*, 34 F.3d 345 (6th Cir.1994) – a case decided after the defendant officers forced Black into Kritis's car – we held that, with respect to non-custodial cases, *Nishiyama* was no longer an accurate statement of the law after *DeShaney* and *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In holding that a school board's negligence in building a school too close to a power line was not actionable under § 1983, we set forth a new test: "What seems to be required is an intentional infliction of injury . . . or some other governmental action that is 'arbitrary in the constitutional sense.' " *Lewellen*, 34 F.3d at 351 (quoting *Collins*, 503 U.S. at 129); *see also Gazette*, 41 F.3d at 1067 (gross negligence is not actionable under substantive due process). We also expressed doubt as to whether even deliberate indifference by state actors could give rise to a substantive due process claim by a plaintiff who was not in the custody of the state. *Lewellen*, 34 F.3d at 350 n. 4.

Of course, the phrase "arbitrary in the constitutional sense" is not self-defining; indeed, in *Collins*, the only elucidation that the Supreme Court provided for that phrase was a reference to the old chestnut of substantive due process claims, "conscience shocking." 503 U.S. at 128. The defendants' argument is essentially that Black's claim fails the test of *Lewellen* and *Collins* because there is no law now, nor was there in 1994, clearly specifying any area of liability under substantive due process. In essence, they argue that there is no clearly established law holding that they have any duty to persons in their custody. As they conceded at oral argument, under their

theory, they would not be liable even if they physically carried Black to the middle of a busy highway and left her there. However, *Collins* carefully noted that its holding was limited to those cases where a plaintiff was not in the custody of the state, and specifically reaffirmed the established law that the state is required to take care to protect persons in its custody from danger. *See Collins*, 503 U.S. at 127; *see also Lewellen*, 34 F.3d at 350 n. 4. Since, as we have held above, viewing the facts in her favor, Black was in the defendants' custody at the time that they forced her into Kritis's truck, they owed her a duty not to endanger her safety.

In cases such as this one, where the plaintiff suffered injury as a result of being placed in the state's custody, it has consistently and uncontroversially been the rule that a constitutional claim arises where the injury occurred as a result of the state's deliberate indifference to the risk of such an injury. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Although each of these cases involved an Eighth Amendment claim raised by a prisoner, we have consistently held that at least the same standard applies to substantive due process claims raised by other persons in the custody of the state. *See Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir.1996) (patient at state mental hospital), *cert. denied*, 117 S.Ct. 1337 (1997); *Lintz v. Skipski*, 25 F.3d 304, 306 (6th Cir.1994) (children in state foster home); *Heflin v. Stewart County*, 958 F.2d 709, 713-14 (6th Cir.1992) (pretrial detainee); *Meador v. Cabinet of Human Resources*, 902 F.2d 474, 476 (6th Cir.1990) (children in state foster home). While *Lewellen* may have declared that the range of culpable conduct is narrower in

cases where the plaintiff is not in the state's custody, it did nothing to change the standard of deliberate indifference in cases involving a custodial relationship. *See Foy*, 58 F.3d at 232 (noting distinction). In cases in which a plaintiff alleges an injury arising out of the state's custody over her, the deliberate indifference test ensures that injuries arising out of truly arbitrary governmental action are compensated, while at the same time avoiding the imposition on to the states of a broad, federalized system of tort law. We therefore re-affirm the application of that test today.

We again note that the district court erred in holding that the entire field of substantive due process law regarding state liability for indirect injury was not clearly established in 1994. *See Chipman*, 858 F.Supp at 90. Although the discussion above reveals that there is obviously considerable uncertainty at the margin, the core principle that the state must not act with deliberate indifference to the risk of injury to persons in its custody is well-established. In the present case, we believe that Black's complaint, as well as the record evidence read in the light most favorable to her, supports a claim that the defendant officers acted with deliberate indifference to the threat of injury to her. They knew, or reasonably should have known, that Kritis was unfit to drive. They knew, or reasonably should have known, that Kritis had assaulted her earlier in the evening and had threatened to hurt her. Nevertheless, they chose to act affirmatively to place her in harm's way.

The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had

reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society. In short, these facts support a substantive due process claim under law that was clearly established in 1994, and we are therefore obliged to reverse the dismissal of her complaint against the individual officers.[12]

IV. Stemler's Claims against the Individual Officers

We turn now to the merits of Stemler's claims against the individual officers. She has raised claims of false arrest and malicious prosecution against the officers. She also asserts that her arrest violated the Equal Protection Clause insofar as it was based either on her sex or on her supposed sexual orientation. We again review the law to determine whether the officers should have known in February 1994 that their actions were in violation of applicable federal constitutional or statutory guarantees.

A. False Arrest and Malicious Prosecution

As noted above, Stemler brought a suit against the defendants herein in the Boone County Circuit Court alleging various state-law theories. The state court

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[12] The defendants have argued that Black is precluded from relitigating the findings of the Boone County Circuit Court in her state-law civil suit. In awarding judgment to the defendant officers on Black's wrongful death claim, the state court held that none of the state actors were the direct cause of the accident on the highway. *Chipman v. City of Florence*, No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996). While those findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim.

awarded summary judgment to the defendants on April 2, 1996. The state court described the facts in relevant part as follows:

> Upon speaking to Stemler, Officer Wince noted the odor of alcohol, conducted field sobriety tests, administered a PBT test (which read .105), and obtained an admission from Stemler that she had consumed alcoholic beverages. Based upon the above, Officer Wince decided to arrest Stemler for DUI.

Stemler v. City of Florence, No. 94-CI-00459, slip op. at 2 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996) (consolidated with *Chipman*). The court reasoned that the evidence established that there was probable cause to arrest her:

> There are no genuinely disputed material facts relating to the question of probable cause for the arrest of the Plaintiff, Stemler. Stemler stated at the scene that she had consumed alcohol, she had the smell of alcohol on her person, her performance on the field sobriety tests and her preliminary breath test result of .105 certainly constitutes [sic] probable cause.

Id. at 5. The state court then held that the existence of probable cause precluded both the false arrest claim and the malicious prosecution claim under Kentucky law.

Stemler is precluded from relitigating in this case the issue of whether there was probable cause to arrest her to the same extent that Kentucky would accord preclusive effect to the judgment against her in her state court civil suit. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82 (1984); *Allen v. McCurry*, 449 U.S. 90, 97

(1980).[13] Under Kentucky law, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Revenue Cabinet v. Samani*, 757 S.W.2d 199, 202 (Ky.Ct.App.1992) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)). The issue of probable cause for Stemler's arrest was actually litigated and decided in the state court suit, and was necessary to the disposition of the case. Although Stemler's appeal is pending in that case, the pendency of an appeal does not destroy the finality of the judgment for the purposes of issue preclusion under Kentucky law. *See Roberts v. Wilcox*, 805 S.W.2d 152, 153 (Ky.Ct.App.1991). Thus, this court is bound by the state court's determination that there was probable cause for Stemler's arrest.

The existence of probable cause for Stemler's arrest forecloses her false arrest claim. A plaintiff bringing a constitutional claim of false arrest under the Fourth Amendment must show that there was not probable cause for the arrest. *See Donovan v. Thames*, 105 F.3d 291,

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[13] Stemler argues, without elaboration, that she did not receive a fair hearing in the state court in her state-law civil suit. However, a state court proceeding is accorded preclusive effect in a later § 1983 suit so long as it meets minimal standards of due process. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982); *Osborn v. Ashland Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1134 (6th Cir.1992). Stemler does not identify any reason to believe that she suffered a deprivation of due process in the state court.

298 (6th Cir.1997) (applying Kentucky doctrine of collateral estoppel).[14] Likewise, the existence of probable cause would negate the possibility of liability under a state-law malicious prosecution theory, and therefore under a federal constitutional theory as well, at least to the extent that Stemler alleges that the defendants sought to prosecute her despite knowing that there was not probable cause to do so. *See Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir.1987).

Stemler, however, is not now asserting that sort of a malicious prosecution claim. Instead, she asserts that even if there were probable cause to prosecute her, Wince committed a constitutional tort by falsifying evidence against her. Under law that was clearly established in 1994, Wince would have violated Stemler's right to due process if he knowingly fabricated evidence against her, and if there is a reasonable likelihood that the false evidence could have affected the judgment of the jury. *See United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989); *see also Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir.1997); *United States v. Epley*, 52 F.3d

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[14] Because we affirm the dismissal of the false arrest claim on the ground of collateral estoppel, we do not address the reasoning of the district court, based on *Albright v. Oliver*, 510 U.S. 266 (1994), that the right to be free from false arrest is not clearly established. On remand, if in the interim Stemler should secure a reversal on appeal of the judgment against her in her state-law suit, thereby destroying the collateral estoppel effect of that judgment, the district court should consider in the first instance whether Stemler's claim may proceed under the standard of qualified immunity that we have set out in this opinion.

571, 576 (6th Cir.1995); *Grillo v. Coughlin*, 31 F.3d 53, 56 (2d Cir.1994). A claim of fabrication of evidence does not require a conclusion that the state did not have probable cause to prosecute the claimant. The state court only found that there was probable cause to prosecute Stemler, and made no findings with regard to any claim of fabrication of evidence. Thus, since the state court in the civil suit made no findings on this issue, and the court in the state criminal case did not make any findings on this issue that were necessary to the final judgment (*i.e.*, Stemler's acquittal), she would not be estopped from pursuing this claim.

B. Failure to Plead an Evidence-Tampering Theory

However, Stemler did not allege this alternative theory in her complaint. The closest she comes to making such an allegation is at paragraph 48 of her amended complaint: "The Defendants, Officers Wince, Dolan, Dusing and City of Florence, instituted and continued the original criminal judicial proceeding against the Plaintiff by insisting upon her prosecution and conviction despite their personal knowledge Plaintiff should not be so prosecuted." This allegation cannot fairly be read to give notice that she seeks to assert an evidence-tampering claim. The record reflects that the evidence-tampering claim first arose on May 7, 1996, in Stemler's response to the city's motion for summary judgment, after the individual officers were dismissed from the suit.

It is well-settled that the parties may constructively amend the complaint by agreeing, even implicitly, to litigate fully an issue not raised in the original pleadings.

See 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1493 at 19 (2d ed.1990). However, such a constructive amendment can have no effect upon a party who has been dismissed from the action, and who is not given notice that a new claim of liability has been asserted against him. Stemler, of course, was free to seek leave to amend her complaint again to raise her new theory of falsification of evidence, or to file a new complaint against Wince explicitly raising that claim. She did not do so. The district court did not err in dismissing Stemler's complaint by failing to consider a cause of action that she had not yet alleged. Consequently, this court is powerless to engage in any further review of her allegation that Wince falsified evidence against her in her criminal trial.

C. *Equal Protection*

The defendants also assert that Stemler is collaterally estopped from pursuing her equal protection claims. However, the determination of probable cause does not preclude a plaintiff from pursuing a claim that the state chose to prosecute her due to invidious discrimination. The courts have long held that a selective enforcement claim may be available even where there is probable cause for prosecution. *See Wayte v. United States*, 470 U.S. 598, 607 (1985); *Oyler v. Boles*, 368 U.S. 448, 455-56 (1962). While we have held that the possibility of a discriminatory motive does not affect the inquiry into the objective reasonableness of an arrest for the purposes of the Fourth Amendment, *see United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir.1993) (en banc), that case did nothing to question the long-established availability of a separate selective

enforcement claim under the Equal Protection Clause. The Supreme Court subsequently confirmed our interpretation of the Fourth Amendment, and at the same time even more explicitly re-confirmed the availability of an equal protection claim despite the existence of probable cause:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

Whren v. United States, 116 S.Ct. 1769, 1774 (1996). Stemler is not collaterally estopped, and we therefore proceed to the merits of Stemler's equal protection claims.

In order to state a claim of selective prosecution, a plaintiff must demonstrate three elements:

> First, [the state actor] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, he must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to.

United States v. Anderson, 923 F.2d 450, 453 (6th Cir.1991) (citing *Wayte*, 470 U.S. at 608 n. 10 & 609). With regard to the first element, it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside her category were not

prosecuted. *See United States v. Armstrong*, 116 S.Ct. 1480, 1487 (1996). Furthermore, there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; "the standard is a demanding one." *Id.* at 1486.

We believe that this is the rare case in which a plaintiff has successfully stated a claim of selective prosecution. Stemler's complaint adequately alleges, and the record evidence supports a finding, that the defendant officers chose to arrest and prosecute her for driving under the influence because they perceived her to be a lesbian, and out of a desire to effectuate an animus against homosexuals. Each of the defendants was aware of Kritis's assertion that Stemler was a lesbian, and Dusing admitted that he relied on Kritis's version of the facts in deciding to arrest Stemler. Furthermore, the record supports a finding that Kritis was similarly situated to Stemler (or, indeed, far drunker than she), that the defendant officers perceived Kritis to be heterosexual, and that consequently they chose not to arrest him at the same time that they arrested Stemler.

The defendants concede that Stemler's complaint alleges, and the record evidence could support a finding, that they decided to arrest and prosecute her because they perceived her to be a lesbian. They do not attempt to assert any justification whatsoever for this decision; instead they argue that as a blanket matter it is always constitutional to discriminate on the basis of sexual orientation, citing *Bowers v. Hardwick*, 478 U.S. 186 (1986). However, *Bowers* held only that there is no substantive due process right to engage in homosexual sodomy, and

expressly declined to consider an equal protection claim. 478 U.S. at 196 n. 8. It is inconceivable that *Bowers* stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation: " 'If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' " *Romer v. Evans,* 116 S.Ct. 1620, 1627 (1996) (quoting *United States Dep't of Agric. v. Moreno,* 413 U.S. 528 (1973)) (internal quotation and ellipses omitted). Stated differently, since governmental action "must bear a rational relationship to a legitimate governmental purpose," *Romer,* 116 S.Ct. at 1629, and the desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause.

While this case, and *Romer,* involved animus related to sexual orientation, the principle involved in our case really has nothing to do with that controversial area. *Moreno,* the case quoted in *Romer,* above, involved commune residents; the principle would be the same if Stemler had been arrested discriminatorily based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company.

It may be objected that *Romer* was not decided until after the defendants arrested and sought to prosecute Stemler allegedly for the sole reason of animus against her perceived sexual orientation. But it didn't take *Romer* to tell us that such arbitrary state action is contrary to the

principle of equal protection of the laws.[15] It is a venerable rule under the Equal Protection Clause that the state may not choose to enforce even facially neutral laws differently against different portions of the citizenry solely out of an arbitrary desire to discriminate against one group. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886).

Furthermore, while a plaintiff in a selective-prosecution case must demonstrate that she was prosecuted because she was the member of some group, and not merely because the state actor prosecuted her out of purely personal animosity, *see Futernick v. Sumter Twp.*, 78 F.3d 1051, 1057 (6th Cir.), *cert. denied,* 117 S.Ct. 296 (1996), the availability of such a claim has never been limited only to those groups accorded heightened scrutiny under equal protection jurisprudence. *See id.* at 1056. Instead, a plaintiff makes out a selective-enforcement claim if she shows that the state based its enforcement decision on an "arbitrary classification," *Oyler v. Boles,* 368 U.S. 448, 456 (1962), that is to say, a classification that gives rise to an inference that the state "intended to accomplish some forbidden aim" against that group through selective application of the laws. *Futernick,* 78 F.3d at 1056. A selective-enforcement claim such as this one is thus conceptually different from a claim that a statute violates equal protection; while almost every statute can be

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[15] We need not discuss whether any other aspect of *Romer* 's holding is sufficiently new that a state actor could not be expected to anticipate it. The core principle relevant in this case, that the state may not act solely out of the desire to harm an unpopular group, was clearly established by the case law in 1994.

shown to have some conceivable rational basis, thereby surviving an equal protection challenge unless it is shown to discriminate against a group accorded heightened scrutiny, it will often be difficult to find a rational basis for a truly discriminatory application of a neutral law.

It is beyond cavil that Stemler has adequately alleged a selective-enforcement claim here. The record supports a finding that she was perceived to be a member of "an identifiable group," and that defendants sought to implement their animus against that group by arresting and seeking to prosecute her. The defendant officers are unable, and indeed have not even attempted, to demonstrate that there is any conceivable rational basis for a decision to enforce the drunk-driving laws against homosexuals but not against heterosexuals. The defendants can rely only on their assertion that discrimination on the basis of sexual orientation should be accorded no scrutiny whatsoever. We emphatically reject this assertion; the proposition that the state may constitutionally discriminate by enforcing laws only against homosexuals (or Centre College graduates or SAE members) is not now, and never has been, the law. Under the facts as we are obligated to construe them, the defendants violated the core principle of the Equal Protection Clause by choosing to exercise the power of the state against Stemler solely for the reason that they disapproved of her perceived sexual orientation. Thus, the dismissal of her complaint must be reversed.

V. Conclusion

With respect to both plaintiffs, the district court's award of summary judgment to the municipal defendants and to the defendants in their official capacities is AFFIRMED. In No. 96-5996, the dismissal of Black's complaint against the individual officers is REVERSED. In No. 96-5993, the dismissal of Stemler's complaint against the individual officers is REVERSED with respect to her claim of denial of equal protection on the basis of sexual orientation; in all other respects, the judgment of the district court is AFFIRMED. Both cases are REMANDED to the district court for further proceedings consistent with this opinion.

CONCURRENCE

HARRY W. WELLFORD, Circuit Judge, concurring. I concur in part II dealing with a conclusion of no municipal liability and propriety of summary judgment for the City and the County in this case. As to part I, I do not necessarily subscribe to all of the findings made, particularly as to subparts B and D. I do not think it necessary to go into the detail recited by Judge Boggs to rule on the orders granting qualified immunity to the individual defendants.

I also concur in parts IV.A and IV.B that "probable cause for Stemler's arrest forecloses her false arrest claim" and that "probable cause would negate the possibility of liability under a state-law malicious prosecution theory," or a false arrest claim. Also, I concur in the

conclusion that Stemler may not pursue further a claim that defendant Wince falsified evidence against her in her state criminal trial.

As to part III, the claim on behalf of the deceased Conni Black, I believe that the alleged conduct of the individual police officers supports reversal of their motions to dismiss. I do have reservations about concluding that deliberate indifference may have been averred as a matter of constitutional law, but I would agree with Judge Boggs to the extent he maintains that "the defendants should have known in February of 1994 that their [alleged] actions violated [Black's constitutional] right."

I would not cite *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir.1987) (en banc), as persuasive authority in this case. The individual defendants in that case had no direct relationship of any kind with the victim. Furthermore, I am doubtful about the continuing authority of *Nishiyama*, and I consider it settled in the Sixth Circuit that gross negligence alone may not subject a police officer to § 1983 liability absent a showing of willful disposition to harm or to deliberately ignore the plight of the victim in custody. *Lewellen v. Metropolitan Gov't of Nashville & Davidson County*, 34 F.3d 345, 351 (6th Cir.1994).

Lewellen also holds that liability of a state actor may arise from some "action that is 'arbitrary in the constitutional sense.' " This is a *higher standard* than gross negligence. *Lewellen* requires some designed and intentional activity on the part of the state actor to harm or punish someone. *Id.* And in this case, there was a sufficient

allegation of arbitrary conduct on the part of some defendants intentionally designed to injure or punish Conni Black. I would hold simply that Black's estate has alleged sufficient facts to survive a motion to dismiss and that we should therefore reverse the contrary holding of the district court and remand for further consideration of the existence and proof of a constitutional tort. To put it another way, the alleged conduct of certain individual defendants may have been sufficiently shocking to the conscience that the Black claim should not have been dismissed against those defendants. *See Collins v. City of Harker Heights*, 503 U.S. 115 (1992). I am, however, particularly reluctant to expand upon the "highly elastic notion of substantive due process." *Lewellen*, 34 F.3d at 351.

I wholeheartedly agree with Judge Boggs' conclusion that "under any definition of the term, Black was in the defendant officer's custody at the time she was forced into Kritis' truck." The district court erred, in my view, in holding that Black, "who was very intoxicated . . . was not taken into custody in the ordinary sense." I believe there is adequate averment and showing that Black was effectually taken into custody. The district court therefore erred, I believe, in granting motions to dismiss as to the individual defendants.

I next address part IV.C, Stemler's remaining claims against the individual officers based upon an alleged equal protection violation, which Judge Boggs characterizes as alleged selective prosecution. I cannot equate an alleged animus against Stemler because of a perception about her sexual proclivities with discrimination based

upon race, sex, national origin, or the like.[1] There may be enough basis in Stemler's claim that some individual defendants based their law enforcement actions on some arbitrary and capricious classification or selectively enforced the laws on drunken driving, public intoxication, or public endangerment to warrant our reversing the dismissal of this claim. However, I do not reach the categorical decision of Judge Boggs that disapproval of Stemler's perceived sexual orientation was the sole, or even a significant, basis for her arrest by the defendants, and that this action therefore violated the equal protection clause.

The district court, upon remand, must also determine the effect, if any, on the federal claims asserted in this case of any future decision of the Kentucky Court of Appeals concerning the individual claims of Stemler and on behalf of Black. There is also the question whether plaintiffs impermissibly split their causes of action in these cases. They could have filed the § 1983 actions in state court. *See Kabealo v. Davis*, 829 F.Supp. 923, 928 (S.D.Ohio 1993) (splitting state claims from federal claims "would result in a needless duplication of expense and judicial resources"); *Administaff, Inc. v. Kaster*, 799 F.Supp. 685, 690 (W.D.Tex.1992) ("Federal and state claims 'inexorably tied together' are best left together").

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[1] I believe *Romer v. Evans*, 116 S.Ct. 1620 (1996), simply holds that a statute purporting to deprive homosexuals of any special protections under state law has no rational relation to legitimate state government purposes. Furthermore, *Romer* was decided long after these defendants acted in this case.

I would affirm the decision of the district court as to the municipal defendants, and as to defendants in their official capacities. I would affirm dismissal of Stemler's claims of false arrest, malicious prosecution, and evidence falsification. I would **REVERSE** and **REMAND** for further proceedings and consideration of alleged federal constitutional torts in light of the decision set out herein, and in light of the Kentucky appellate decision on the remaining claims.[2]

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[2] I also note the death of the Boone County Sheriff.

Case No: 96-5993/5996

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Nov. 13, 1997)

SUSAN STEMLER

Plaintiff - Appellant

v.

CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; JOHN DOLAN, Florence Police Department

Defendants - Appellees

BEFORE: MERRITT, WELLFORD and BOGGS, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellees,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

Judge Wellford would adhere to his separate opinion and would augment it as attached.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOS. 96-5993/5996; *STEMLER AND CHIPMAN V. CITY OF FLORENCE*

HARRY W. WELLFORD, Circuit Judge, would adhere to his separate opinion. I would augment it by adding that defendant officers had a clear duty under the circumstances not to place the victim Black in harm's way by placing her in Kritis' vehicle while she was obviously severely intoxicated. Such defendants "must both be aware of facts from which an inference could be drawn that a substantial risk of serious harm exist[ed], and [they] must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Under the circumstances at the time, a special relationship existed between the officers and Black which extended the chain of causative events.

William CHIPMAN, Administrator of the Estate of Conni Black, Plaintiff

v.

CITY OF FLORENCE, et al., Defendants.

No. 94-cv-062.
United States District Court,
E.D. Kentucky,
at Covington.

Oct. 12, 1994.

BERTELSMAN, Chief Judge:

I. INTRODUCTION

Plaintiff, the administrator of Conni Black's estate, initiated this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that the defendants, the City of Florence, three Florence police officers and two Boone County sheriff's deputies, deprived Ms. Black of her life without due process of law.

Defendants previously moved to dismiss Plaintiff's complaint. On August 2, 1994, this court issued an opinion and order (doc. # 41) concluding that the individual officers are entitled to qualified immunity and dismissing Plaintiff's claims against the law enforcement officers in their individual capacities. This matter is now before the court for consideration of Plaintiff's motion to reconsider the court's August 2, 1994 opinion and order (doc. # 42) and Plaintiff's motion for leave to file an amended complaint (doc. # 43). Defendants have responded (docs. # 47, 48), and Plaintiff filed a reply in support of its motion for leave to amend (doc. # 49).

II. FACTUAL BACKGROUND[1]

In the early morning hours of February 20, 1994, the decedent, Conni Black, was involved in an altercation with her boyfriend, Steve Kritis, at a bar in Florence, Kentucky. Mr. Kritis struck Ms. Black twice and threatened to kill Ms. Black and her friend, Susan Stemler.

In an attempt to escape from Mr. Kritis' abuse, Ms. Stemler and Ms. Black left the bar and fled in Ms. Stemler's automobile. Mr. Kritis followed the women in his truck. After a brief chase, Mr. Kritis cornered the automobile driven by Ms. Stemler in a driveway at the end of a dead end street. Mr. Kritis parked his truck in such a way as to block the path of Ms. Stemler's car. Mr. Kritis then approached the women's car shouting threats of violence. Ms. Stemler sounded her horn in an attempt to obtain assistance. The owner of a nearby house heard the commotion and immediately called the police.

Before the police could respond, Ms. Stemler maneuvered her vehicle through a lawn and onto the street beyond Mr. Kritis' vehicle. Mr. Kritis returned to his truck and resumed the chase. The owner of the house and

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[1] Because this matter is before the court on a motion to reconsider the court's earlier ruling concerning motions to dismiss, the court must accept as true the allegations contained in Plaintiff's amended complaint. As the court has concluded that justice would be served by permitting Plaintiff to amend his complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, the allegations contained in Plaintiff's amended complaint will also be accepted as true for purposes of rendering this opinion, and all reasonable inferences will be drawn in favor of the plaintiff.

another witness joined the chase in an effort to protect Ms. Stemler and Ms. Black.

Shortly after the chase resumed, Ms. Stemler attracted the attention of a Florence police officer. Ms. Stemler ran to the officer and asked him to protect the women from Mr. Kritis, who had stopped his vehicle at a traffic light behind Ms. Stemler's automobile. Shortly thereafter, four other law enforcement officers arrived.

Both Steve Kritis and Susan Stemler smelled of alcohol. Ms. Black was so intoxicated that she was unable to remove her seatbelt or to walk without assistance.

Mr. Kritis told the officers that Ms. Black was his girlfriend and that Ms. Stemler was a lesbian who was trying to "steal" his girlfriend. Ms. Stemler and another witness related to the officers the events that had occurred that night.

The officers administered a field sobriety test to Susan Stemler. Although Ms. Stemler passed the field sobriety test, the officers arrested her for driving under the influence of alcohol. Ms. Black was given the choice of leaving the scene with Mr. Kritis or being placed under arrest. Ms. Black chose to accompany Mr. Kritis.

Two officers assisted Ms. Black out of Ms. Stemler's automobile and into Mr. Kritis' truck. Less than five minutes later, Mr. Kritis crashed his truck, killing Ms. Black. Tests revealed that Mr. Kritis' blood alcohol level exceeded .20, more than twice the legal limit. Ms. Black's blood alcohol level was reported as .237.

On May 20, 1994, Mr. Kritis was indicted for second degree manslaughter in the death of Conni Black. He was

also indicted for felonious wanton endangerment as to Susan Stemler.

Plaintiff initiated this action against the City of Florence and the five law enforcement officers present at the scene, pursuant to 42 U.S.C. § 1983. The defendant law enforcement officers moved to dismiss Plaintiff's complaint on the basis that they are entitled to qualified immunity. Defendant City of Florence moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

After reviewing the parties' briefs and conducting oral argument, this court concluded that the defendant law enforcement officers had not violated clearly established law and were, therefore, entitled to qualified immunity. The court issued an opinion and order dismissing all claims against the defendant law enforcement officers in their individual capacities and denying without prejudice the City's motion to dismiss (doc. # 41). Plaintiff now seeks reconsideration of that opinion and order.

III. ANALYSIS

Government officials, including police officers, "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Black v. Parke*, 4 F.3d 442, 444 (6th Cir.1993) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)); *see also O'Brien v. Grand Rapids*, 23 F.3d 990 (6th Cir.1994). A constitutional right is

"clearly established" if the law is "clear in regard to the officials' particular actions in the particular situation." *Black*, 4 F.3d at 445 (quoting *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir.1991)). That is, "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). Therefore, the official will be immune if officers of reasonable competence could disagree concerning whether specific conduct violates a plaintiff's rights. *Caldwell v. Moore*, 968 F.2d 595, 599 (6th Cir.1992).

In its August 2, 1994 opinion and order, this court concluded that, while an abstract right to substantive due process has been clearly established, the law concerning a public official's obligations in protecting an individual from private violence is not clearly established. Doc. # 41 at 4-5. In reaching its conclusion, the court examined the holdings in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (state's failure to protect child from beating administered by known child abuser does not state a violation of the Due Process Clause) and *Walton v. City of Southfield*, 995 F.2d 1331 (6th Cir.1993) (officers who abandoned minor passengers at time of driver's arrest entitled to qualified immunity).

Relying extensively on the Sixth Circuit's opinion in *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir.1987), Plaintiff once again contends that the law is clearly established that "police officers who actively facilitate indirect harm are subject to § 1983 liability." *See* doc. # 42 at 3 and 5. However, the Sixth Circuit's recent opinion in *Lewellen*

v. Metropolitan Government, 34 F.3d 345 (1994) (available at 1994 WL 459270) specifically rejects *Nishiyama* and confirms this court's conclusion that the contours of an individual's right to be free from state facilitation of indirect harm are not clearly established.

In *Lewellen*, Bobby Lewellen was severely electrocuted while assisting in the construction of a new school building. The architect's plans for the new building specified that a 23,900-volt power line used to supply electricity to the existing school was to be moved during the course of construction. Relocation of the power line would require an interruption of electrical service to the existing middle school for six to eight hours. The school board was unwilling to allow power to be shut off while school was in session, and the school board, the contractor and the electrical subcontractor all refused to pay the $600 to $1000 in overtime required to move the power line on a weekend or holiday. The parties, therefore, agreed to move the power line on a week day during Christmas vacation to avoid incurring overtime charges.

Construction of the new building continued through the summer and fall of 1988. When the framework of the new building was completed in mid-December, the top of the building came within seven feet of the live power line. On December 19, 1988, Mr. Lewellen was working on the roof of the new building. He sustained serious injuries when a piece of steel bridging he was carrying came into contact with the 23,900-volt power line. Mr. Lewellen brought an action against the city and the board of education, pursuant to 42 U.S.C. § 1983, alleging that those defendants violated his substantive due process

rights by depriving him of a liberty interest without due process of law.

In affirming the District Court's entry of summary judgment in favor of the defendants, the Sixth Circuit specifically rejected the approach taken in *Nishiyama*, the case upon which Plaintiff in this case relies to "clearly establish" Ms. Black's substantive due process rights. *Lewellen*, 34 F.3d at 350. In addition, the Court reviewed the various conflicting standards applied to substantive due process cases in the last several years where public actions led to non-intentional private injury. *Lewellen*, at 349-52 (comparing and contrasting the standards applied in *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261; *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Nobles v. Brown*, 985 F.2d 235 (6th Cir.1992) and *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir.1987)); *see also Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir.1994) and *Pinder v. Johnson*, 33 F.3d 368 (4th Cir.1994).

After comparing various substantive due process cases and reviewing the Supreme Court's traditional approach to the Due Process Clause, the Sixth Circuit concluded:

> The Supreme Court has repeatedly declared its unwillingness to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." . . . What *seems* to be required is an intentional infliction of injury . . . or some other governmental action that is "arbitrary in the constitutional sense."

Lewellen, 34 F.3d at 351 (citations omitted) (emphasis added). In this case, Plaintiff claims that Defendants "demonstrated deliberate indifference to the constitutional rights of Conni Black, and they affirmatively facilitated the criminal and grossly negligent conduct of Steve Kritis, rendering them personally liable to Plaintiff under 42 U.S.[C.] § 1983." Amended Complaint, tendered September 7, 1994, para. 40.

In its previous opinion, the court examined the relevant case law concerning governmental facilitation of private torts and concluded that the law in that area is not clearly established. *See* doc. # 41. The Sixth Circuit's recent decision in *Lewellen v. Metropolitan Government* substantiates the court's conclusion. Indeed, the Sixth Circuit's effort to enunciate what "*seems* to be required" indicates that the contours of a person's right to be free from state facilitation of indirect harm are unclear even to the judiciary. Not only is the constitutional duty to one not in custody unclear, but the "deliberate indifference" and "gross negligence" standards generally have been cast in doubt as well. *Id.* at 351. The *Lewellen* Court even went so far as to state, "Gross negligence is not actionable under § 1983, because it is not 'arbitrary in the constitutional sense.' " *Id.* at 351 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, ___, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261 (1992)).

As the constitutional rights which the defendant law enforcement officers allegedly violated in this case are not clearly established, those defendants are entitled to qualified immunity.

Therefore, the court being advised,

IT IS ORDERED that:

1. Plaintiff's motion to amend his complaint (doc. # 43) is granted; and

2. Plaintiff's motion for reconsideration of the court's August 2, 1994 opinion and order (doc. # 42) is denied.

William CHIPMAN, Administrator of the Estate of Conni Black, Plaintiff,

v.

CITY OF FLORENCE, Bobby Jo Wince; John Dolan; Thomas Dusing; Ron Kenner; Rob Reuthe; and Chris Alsip, Defendants.

Civ. A. No. 94-62.
United States District Court
E.D. Kentucky,
Covington Division.

Aug. 2, 1994.

OPINION & ORDER

BERTELSMAN, Chief Judge:

This is a civil rights action, pursuant to 42 U.S.C. § 1983, which alleges that the City of Florence, three Florence police officers, and two Boone County Sheriff deputies caused the death of Conni Black.

William Chipman, Administrator of the Estate of Conni Black is the plaintiff herein; the City of Florence, Kentucky, Bobby Jo Wince, John Dolan, Thomas Dusing, Ron Kenner, Rob Reuthe and Chris Alsip are the defendants herein.

This matter is before the court on (1) the motion of defendants Wince, Dolan and Dusing [Florence Police officers] to dismiss (Doc. # 3), and (2) the motion of the defendant City of Florence to dismiss (Doc. # 5).

Although affidavits have been filed, a hearing showed that it was inappropriate to treat the matter as

one for summary judgment, and the affidavits will not be considered. Fed.R.Civ.P. 12(b)(6).

FACTUAL BACKGROUND

The following facts are taken from plaintiff's complaint, giving the plaintiff the benefit of all inferences.

On the evening of February 19, 1994, and the early morning hours of February 20, 1994, Conni Black, Susan Stemler, and Steve Kritis were patrons at Willies' Saloon at the Ramada Inn in Florence, Kentucky. Kritis, Black and Stemler apparently had an argument during the course of which Kritis allegedly struck and threatened to kill Black. To escape Kritis, Stemler and Black left the establishment in an automobile driven by Stemler. Kritis chased them in his vehicle and allegedly rammed his vehicle into Stemler's during the pursuit.

Eventually, Stemler attracted the attention of a Florence Police Officer, Thomas Dusing. Stemler allegedly described the preceding events to Officer Dusing and asked for his assistance. However, Officers Dusing, Bobby Wince and John Dolan, along with Deputies Chris Alsip and Rob Reuthe of the Boone County Sheriff's Department allegedly ignored Stemler's pleas. Instead, Stemler was arrested for driving under the influence. Kritis, although questioned by the police, was never given a sobriety test.

Black, who was very intoxicated, was allegedly told by the officers that if she did not voluntarily go with Kritis, she would also be arrested. Black went with Kritis. Black was allegedly so intoxicated that the police had to

assist her out of Stemler's vehicle and into Kritis' vehicle. Some time later, Kritis, who was operating his vehicle under the influence of alcohol, wrecked his vehicle and Black was killed. Kritis was subsequently charged with manslaughter.

Consequently, William Chipman, the administrator of Black's estate, filed this suit against Wince, Dolan, Dusing, Reuthe and Alsip, in their individual capacities, and the City of Florence, and Ron Kenner, the Sheriff of Boone County, in their official capacities. Specifically, Chipman asserts that the individual officers violated Black's Fourteenth Amendment right not to be deprived of life without due process of law. This is a substantive due process claim. Chipman also contends that the City of Florence and the Sheriff of Boone County failed to properly train and supervise its officers.

ANALYSIS

It is well-settled that government officials performing discretionary functions generally have qualified immunity from liability for civil damages insofar as their conduct does not violate a clearly established constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Thus, to avoid qualified immunity, it must be shown that the particular conduct of an official clearly fell within an area protected by a constitutional right, such that a reasonable official would have known that his or her conduct violated the constitutional right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034,

3039, 97 L.Ed.2d 523 (1987); *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir.1993).

The Sixth Circuit has recently made clear in an extensive analysis that, where police officers are concerned, the test of whether their actions clearly violated constitutional rights is not to be applied from "the infallible perception of 20/20 hindsight," but rather in the light of the exact circumstances the officers were facing in the field. *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 999 (6th Cir.1994). The court also stated:

> "To determine whether qualified immunity protects [the officers] we must inquire: 1) whether [the plaintiff] identified a clearly established right alleged to have been violated; and 2) whether a reasonable police officer in the defendant's position should have known that his conduct was undertaken in violation of these rights."

Id.

Plaintiff here seeks relief for what one scholar refers to as "indirect injury," that is, one inflicted not by the agents of the government but by someone else, from whom the government allegedly should have protected the plaintiff. Julie Shapiro, *Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm*, 62 U.Cinc.L.Rev. 883 (1994) (hereinafter *Snake Pits*).

Plaintiff contends that the officers violated Black's clearly established Fourteenth Amendment right to life as protected by the doctrine of substantive due process when they placed her in Kritis' vehicle and left her in his care. This court disagrees.

The abstract right of substantive due process is indeed well established. *See e.g., Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1216 (6th Cir.1992). However, our analysis must not be abstract but "on a fact- specific, case-by-case basis." *O'Brien,* 23 F.3d at 999. Specifically, the court must inquire "whether a reasonable police officer in the defendants' position should have known that his conduct was undertaken in violation of these rights." *Id.*

This inquiry shows that the law in this area is unclear and that not only would no reasonable police officer have known what duty was owed to the plaintiff under the facts alleged in this case, but even the Supreme Court is uncertain on the matter.

As stated by the Supreme Court in *DeShaney v. Winnebago County DSS,* 489 U.S. 189, 195, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. It is only when the State takes a person into its custody and holds him there against his will that the Constitution imposes upon the State a duty to assume some responsibility for his safety and general well-being. *Id.*, 489 U.S. at 198, 109 S.Ct. at 1005. Additionally, the Supreme Court stated that:

> "[h]ad the State by the affirmative exercise of its power removed [the plaintiff] from free society and placed him in a foster home operated by its agents, we *might* have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. . . . We express no view on the validity of

> this analogy, however, as it is not before us in the present case."

Id., 489 U.S. at 200 n. 9, 109 S.Ct. at 1006 n. 9 (emphasis added).

The lower courts are divided on the duty owed in the "indirect harm" situation. *See Walton*, 995 F.2d at 1336-38 (officers who allegedly abandoned minor passengers, who were 15 and two years old at the time of driver's arrest, were entitled to qualified immunity); *but see White v. Rochford*, 592 F.2d 381 (7th Cir.1979) (police not entitled to qualified immunity for leaving minor passengers at the side of the road after having arrested the driver).

In Walton, the Sixth Circuit states "[t]here is disagreement about the issue raised by this case, both among the circuits which have addressed it, and within one of those circuits." 995 F.2d at 1337.[1]

The learned author of the law review article cited above makes some thoughtful suggestions as to how the law might be resolved in this troubled area. It has not, however, been so resolved, nor in any way resolved, at this time. Indeed, she observes:

> "Section 1983 liability in cases of indirect harm remains a subject of much dispute and confusion. *A review of the cases at first discloses an array of disparate approaches* relying on apparently conflicting – or, at best, unrelated – legal rules."

Snake Pits, at 945 (emphasis added).

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[1] The court then extensively discusses numerous cases to which the reader is referred in the interest of saving space. *See also* the numerous cases discussed in *Snake Pits*.

This court concludes that the law is unsettled on the issue of whether Conni Black, who was not taken into custody in the ordinary sense, had a clearly established right to be protected by the police under the circumstances alleged in the complaint. As such, the officers are entitled to qualified immunity even construing the complaint with every liberality.

The municipalities, however, may not invoke the doctrine of qualified immunity. Rather, the plaintiff may recover if he can show that the damage was the result of an unconstitutional city or county policy, or failure to train, subject to the complex rules governing those kinds of liability. *Cf. O'Brien v. City of Grand Rapids, supra.* The complaint alleges such theories on the part of the city and county and a determination of their liability must await further factual development.

It should be noted that the plaintiff may have a negligence remedy under state law against the officers, and, indeed a state action is pending.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That the motion of defendants Wince, Dolan, and Dusing, to dismiss (Doc. # 3) be, and it is, hereby granted, and the claims against them in their individual capacities are dismissed;

2. That the oral motion of defendants Reuthe and Alsip to dismiss be, and it is, hereby granted, and the claims against them in their individual capacities are dismissed; and

3. That the motion of defendant City of Florence to dismiss (Doc # 5) be, and it is, hereby denied, without prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON, KENTUCKY

WILLIAM CHIPMAN, ADMINISTRATOR OF THE ESTATE OF CONNI BLACK, Plaintiff vs. CITY OF FLORENCE 7431 U.S. 42 Florence, Kentucky 41022-0215 Serve: Mayor Evelyn Kalb 7431 U.S. 42 Florence, KY 41042 and BOBBY JOE WINCE FLORENCE POLICE DEPARTMENT 7431 U.S. 42 Florence, Kentucky 41022-0215 and JOHN DOLAN FLORENCE POLICE DEPARTMENT 7431 U.S. 42 Florence, Kentucky 41022-0215 and THOMAS DUSING FLORENCE POLICE DEPARTMENT 7431 U.S. 42 Florence, Kentucky 41022-0215	CASE NO. 94-___ Judge William O. Bertelsman COMPLAINT WITH JURY DEMAND

and

RON KENNER
BOONE COUNTY SHERIFF
Boone County Courthouse
Burlington, KY 41005

and

ROB REUTHE
BOONE COUNTY SHERIFF'S
DEPARTMENT
Boone County Courthouse
Burlington, KY 41005

and

CHRIS ALSIP
BOONE COUNTY SHERIFF'S
DEPARTMENT
Boone County Courthouse
Burlington, KY 41005

Defendants

Comes now the Plaintiff, William Chipman, Administrator of the Estate of Conni Black, by and through counsel, and for his cause of action states as follows:

1. This is a civil action for damages brought by the Plaintiff, the administrator of an estate, against the City of Florence and the Boone County Sheriff for the violation of Conni Black's rights under the Constitutions and laws of the United States and of the State of Kentucky.

2. This is an action brought to recover damages, and to redress the deprivation under color of city, state and federal law, or custom or usage, of rights privileges, and immunities secured by the Constitution of the United

States, particularly the right to life and liberty, and by Title 42, United States Code, Section 1983.

3. This Court has jurisdiction of this matter, a federal question, under title 28, United States Code, Sections 1331.

4. The facts giving rise to this claim arose within this judicial district, and the Defendants are legal residents of this judicial district. Venue of this action thereby properly lies in the United States District Court for the Eastern District of Kentucky pursuant to the provisions of Title 28, United States Code, Section 1391(b).

5. The Plaintiff is the Administrator of the Estate of Conni Black from Kenton County, Kentucky who died on February 20, 1994.

6. On February 19, 1994, Conni Black was a patron at Willie's Saloon, a night club located at the Ramada Inn at 7915 U.S. 42, Florence, Boone County, Kentucky.

7. Steve Kritis, another patron at Willie's Saloon on February 19, 1994 and the early morning hours of February 20, 1994, physically struck and threatened to hurt and kill Conni Black in the presence of numerous witnesses at Willie's Saloon, including Susan Stemler.

8. To remove herself from the physical attacks and threats from Steve Kritis, Conni Black attempted to leave the establishment of Willie's Saloon as a passenger in another automobile driven by Susan Stemler. Steve Kritis followed this automobile in his Toyota truck and physically struck it by ramming his Toyota pickup truck into the rear bumper of the vehicle.

9. Susan Stemler attracted, by her own volition and intention, the attention of the Florence Police Officer, Thomas Dusing, Defendant, who approached the Stemler vehicle.

10. Susan Stemler described all the preceding events to Officer Dusing and asked for his help for herself and Conni Black.

11. Officer Bobby Wince, with the assistance of Officer John Dolan, Officer Thomas Dusing and Deputy Chris Alsip of the Boone County Sheriff's Department, ignored Susan Stemler's pleas, and participated in her arrest for DUI. After the Stemler arrest, and without performing any sobriety tests on Steve Kritis, the aforesaid officers forced by threats and assisted Conni Black, against her will, to become a passenger in Steve Kritis' Toyota truck, all against the pleas and warnings of Susan Stemler and Conni Black.

12. Deputy Rob Reuthe of the Boone County Sheriff's Department failed to follow appropriate procedures in questioning and checking Steve Kritis at the scene in Boone County Kentucky where Susan Stemler stopped the police.

13. Some time after Conni Black was forced into the Toyota truck of Steve Kritis, Steve Kritis operated his truck under the influence of alcohol and had an accident killing Conni Black, and/or he intentionally killed Conni Black in Boone County, Kentucky.

14. On the early morning of February 20, 1994, Conni Black was dead.

15. The Defendant, City of Florence, Kentucky, is and was at all relevant times set forth herein, a municipality created and existing under the Constitution and laws of the State of Kentucky.

16. The Defendant, Ron Kenner, Boone County Sheriff, is and was at all relevant times set forth herein, the Sheriff of Boone County, an office created and existing under the Constitution and laws of the State of Kentucky. Ron Kenner is made Defendant to this action not as an individual, but in his official capacity.

17. The arrest of Susan Stemler and the lack of arrest, detention, prosecution and incarceration of Steve Kritis and Conni Black, as alleged herein, was conducted and perpetrated in accordance with the policies, customs, usages or ordinances of the City of Florence and Boone County Sheriff's Department, or in the alternative the subject officers failed to follow same.

18. The Defendants, Thomas Dusing, John Dolan and Bobby Joe Wince, are and at all material times mentioned herein, members of the City of Florence Police Department, and as officers of the Florence Police Department implemented a custom, policy, usage or practice of arresting persons and not arresting persons. At all material times set forth herein, the Defendant officers were acting in their authorized and official capacity as law enforcement officers.

19. The Defendants, Chris Alsip and Rob Reuthe are and at all material times mentioned herein, members of the Boone County Sheriff's Department, and as officers of the Boone County Sheriff's Department implemented a custom, policy, usage or practice of arresting persons and

not arresting persons. At all material times set forth herein, the Defendant officers were acting in their authorized and official capacity as law enforcement officers.

20. Conni Black was denied the protection of her constitutional rights of life and liberty under the Kentucky and United States Constitution by the Defendants collectively by their failure to protect her from Steve Kritis, resulting in her death.

21. The Defendants engaged in concerted action amounting to conspiracy, and in fact intended to deny Conni Black, her rights and privileges guaranteed by the Constitution and laws of the United States.

22. The Defendants, City of Florence and Boone County Sheriff's Department, failed to properly and lawfully employ, train and supervise its officers, including the Defendant officers named as Defendants herein.

23. In addition or in the alternative, the acts of the individual Defendants and, vicariously, the acts of the Defendants, City of Florence and Boone County Sheriff, all as herein alleged and complained of, were intentional, were in gross violation of known lawful standards for arrest and their unlawful actions in this regard rendered it inevitable that harm would result to Conni Black.

24. In addition or in the alternative, the practices, customs, usages, ordinances and regulations of the Defendants, City of Florence and Boone County Sheriff, as implemented by the Florence Police Department and the Boone County Sheriff's Department, and others, all as alleged herein, created a foreseeable risk of harm to Connie Black which the Defendants had a duty to prevent.

WHEREFORE, the Plaintiff requests all compensatory damages, punitive damages, costs and attorney fees pursuant to Title 42, United States Code, Section 1983 he is entitled to in this action, jointly and severally, against all the Defendants. Plaintiff further requests a trial by jury on all issues so triable and all other and further relief to which he may be entitled, and which to the Court may seem just and proper.

/s/ Charles H. Deters
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/s/ Eric C. Deters
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON, KENTUCKY

WILLIAM CHIPMAN, ADMINISTRATOR OF THE ESTATE OF CONNI BLACK,	*	CASE NO. 94-62
PLAINTIFF	*	Judge William O. Bertelsman
VS.	*	
CITY OF FLORENCE, ET AL	*	
DEFENDANTS	*	

AMENDED COMPLAINT

Comes now, William Chipman, Administrator of the Estate of Conni Black, by and through counsel, and for his Amended Complaint states as follows:

1. He adopts and incorporates herein by reference all facts, allegations and claims set forth and described in the Complaint.

2. At approximately 2:00 - 2:30 a.m., on February 19, 1994, Steve Kritis, in the presence of witnesses, including Susan Stemler, physically struck Conni Black by slamming her entire body, including her head, against a wall inside the woman's restroom at the Ramada Inn, Florence, Kentucky.

3. Moments after this act of violence, and following Steve Kritis' use of force to remove Conni Black from the woman's restroom, Steve Kritis, in the presence of witnesses, including Susan Stemler, physically struck Conni Black by slamming her entire body, including her head, against a concrete wall in the lobby of the Ramada Inn.

4. Steve Kritis, during the aforedescribed events, in the presence of witnesses, including Susan Stemler, directly and verbally threatened to kill Conni Black.

5. Immediately following his assault against Conni Black and threats on the life of Conni Black, Steve Kritis, in the presence of witnesses, physically struck Susan Stemler in the back of her head with his clinched fist while Susan Stemler walked toward her automobile in the parking lot of Ramada Inn, Florence, Kentucky.

6. Steve Kritis, sometime during all of the aforedescribed events, told Laura Stemler, Susan Stemler's sister and also present at the Ramada Inn, that he intended to kill Susan Stemler.

7. Laura Stemler, following the aforedescribed events while a patron of Willie's Saloon and Ramada Inn, attempted to telephone the police to request their assistance on behalf of Conni Black and Susan Stemler. The management of Willie's Saloon, represented by the manager of Willie's Saloon, John Hines, refused Laura Stemler access to the telephone by physically blocking the telephone from her use.

8. Thereafter, Susan Stemler, at the request of Conni Black, left the Ramada Inn in her Volkswagen automobile with Conni Black, as her passenger with the purpose of fleeing the threats and assaults of Steve Kritis. An extremely intoxicated Steve Kritis, alone, chased after them as he drove his Toyota pick-up truck. During this entire chase, Steve Kritis failed to illuminate the headlights on his truck.

9. After being chased by Steve Kritis down several streets in the City of Florence, Kentucky, for about fifteen minutes to one-half hour, Susan Stemler was forced by Steve Kritis to stop in the driveway of William Minnick's house at the dead end of Woodland Avenue, Florence, Kentucky. At this location, Susan Stemler utilized the horn in her automobile to signal for help.

10. William Minnick, a retired Florence Police Officer, upon hearing Steve Kritis yelling and Susan Stemler's horn sounding, called 911 from his house and requested police assistance to the scene.

11. While an extremely frantic and crying Susan Stemler and Conni Black remained at all times in Susan Stemler's car with the windows up and doors locked as they parked in William Minnick's driveway, an extremely intoxicated Steve Kritis used his truck to block the path of Susan Stemler's car in the driveway. Steve Kritis exited his truck, shouted threats of violence towards Susan Stemler and Conni Black and pounded on Susan Stemler's passenger door with his fist.

12. Terry Barker, an eyewitness driving an automobile, observed and heard the entire aforedescribed chase through Florence and the scene at William Minnick's driveway. He observed the chase, Steve Kritis' truck without illuminated headlights and Steve Kritis shouting in William Minnick's driveway.

13. Uncertain about their personal safety and uncertain whether or not police assistance had been summoned and was forthcoming, Susan Stemler drove her car through William Minnick's yard and escaped from Steve Kritis.

14. William Minnick observed Susan Stemler's driving and found her driving to be both appropriate and skillful under the circumstances.

15. Steve Kritis immediately returned to his truck and drove away from William Minnick's driveway to renew his chase of Susan Stemler and Conni Black. Steve Kritis' headlights remained off as he renewed his chase.

16. In an effort to assist Susan Stemler and Conni Black, whose lives he believed in danger, Terry Barker, who had parked his car on Woodlawn Avenue near William Minnick's residence to observe and listen to the aforedescribed events, pulled his automobile between Susan Stemler's automobile and Steve Kritis's truck as they drove up Woodland Avenue.

17. As Steve Kritis renewed his chase up Woodland Avenue, a residential street, he passed Terry Barker's automobile to catch up with Susan Stemler's automobile by driving at an extremely high rate of speed, and by further driving through private yards of homes on Woodland Avenue nearly hitting Terry Barker's automobile.

18. As William Minnick drove his truck from his driveway in an attempt to follow the Stemler and Kritis vehicles, he stopped to talk to Officer Kuhlman of the Florence Police Department who had arrived by police cruiser to Woodland Ave in response to the 911 call. Officer Kuhlman informed William Minnick he believed the chase involved a "domestic" problem.

19. As Susan Stemler turned left off Woodland Avenue and traveled west on U.S. 42 at Tanners Lane, she

attracted the attention of Officer Tom Dusing of the Florence Police Department as he drove his police cruiser east on U.S. 42.

20. After exiting his cruiser, but before Officer Dusing could approach the Stemler vehicle, Susan Stemler exited her automobile, ran to Officer Dusing and pleaded for help and assistance from Steve Kritis who had stopped at a traffic light, headlights still off, behind Susan Stemler's automobile.

21. Officer Dusing requested Susan Stemler wait in her automobile and walked forward to speak with Steve Kritis. As he spoke to Steve Kritis, Officer Dusing smelled alcohol on Steve Kritis' breath. Officer Dusing informed, at the scene, William Minnick of this fact. (William Minnick had arrived on the scene.) Furthermore, Susan Stemler told Officer Dusing the entire sequence of events including the obvious fact that Steve Kritis was extremely intoxicated and violent.

22. The Defendant Florence Police Officers nor the Defendant Boone County Deputies interrogated Steve Kritis or conducted any field sobriety tests on Steve Kritis.

23. At the stop scene at Tanners Lane and U.S. 42 from approximately 2:30 - 3:00 a.m., Steve Kritis' blood alcohol level exceeded the legal limit and was in excess of .20.

24. At the stop scene, Officer Dusing blocked Susan Stemler's automobile by parking his cruiser immediately in front of her automobile in the opposite direction. Four additional law enforcement cruisers, each driven by an

officer Defendant, surrounded the Stemler vehicle so as to prevent it from leaving the scene. Each of these cruisers, along with Officer Dusing's had their emergency lights on and flashing. At the stop scene, Conni Black, during this entire time, never exited the Stemler automobile.

25. At the stop scene, Susan Stemler's blood alcohol level, having had only two Irish Coffees from the time she arrived at Willie's Saloon at 1:00 A.M. until it closed at 2:00 A.M., was below the legal limit of .10. At the stop scene, Conni Black's blood alcohol level, having been drinking heavily with Steve Kritis at Willie Saloon's since 10:00 P.M. until it closed at 2:00 A.M., exceeded .20.

26. To divert attention from himself, Steve Kritis falsely informed the Defendant Florence Officers and Boone County Deputies at the stop scene that Susan Stemler was a lesbian stealing his girlfriend.

27. Susan Stemler, not being a lesbian, was attempting, at Conni Black's request, to assist Conni Black in fleeing the danger of Steve Kritis' threats and acts of violence.

28. Deputy Chris Alsip told William Minnick at the scene Susan Stemler was a lesbian. Also, at the stop scene, each of the Defendant Florence Officers and Boone County Deputies joked and laughed about Susan Stemler being a lesbian.

29. At the stop scene, Terry Barker told Officer Dolan and Deputy Reuthe everything he witnessed, heard and observed, all of which is described herein. He

informed Officer Dolan and Deputy Reuthe, that they were arresting the wrong person in Susan Stemler.

30. At the stop scene, Susan Stemler told Officer Dusing everything she witnessed, heard and observed, all of which is described herein.

31. Officer Wince conducted field sobriety tests on Susan Stemler, all of which she passed, and arrested Susan Stemler, with the cooperation, assistance and encouragement of all the law enforcement officer Defendants at the scene, for driving under the influence. Susan Stemler's arrest was solely based upon Officer Wince's and the law enforcement officer Defendants' prejudice and bias towards Susan Stemler, based upon a false accusation from Steve Kritis that she was a lesbian.

32. After the arrest of Susan Stemler for driving under the influence, Officer Dolan, at the direction of Officer Dusing, threatened to arrest Conni Black, who was clearly intoxicated with a blood alcohol level in excess of .20, if she refused to leave the stop scene with Steve Kritis in his truck.

33. Without her own car, having lost the assistance of Susan Stemler, under threat of arrest and against her will, Conni Black capitulated to the threats of the Defendant law enforcement officers and involuntarily left the stop scene with Steve Kritis.

34. Conni Black, totally intoxicated and inebriated, was unable to remove her seat belt or walk without assistance. Therefore, Officer Dolan and Deputy Alsip removed her seat belt, helped her out of the Stemler

automobile, assisted her to the Kritis truck and aided her into the passenger seat of the Kritis truck.

35. At this time and place, when Conni Black was placed in his truck by Officer Dolan and Deputy Alsip, Steve Kritis' blood alcohol level exceeded .20 based on blood alcohol tests subsequently administered. Immediately, upon Conni Black entering his truck, Steve Kritis drove away from the scene and immediately drove onto Interstate 75 North towards Cincinnati, Ohio.

36. Within two (2) miles and five (5) minutes from the stop scene and while driving on Interstate 75, Steve Kritis killed Conni Black in Boone County, KY. At the time of her death at approximately 3:05 A.M., Conni Black's blood alcohol, according to an autopsy report, was .237.

37. After finding Steve Kritis and his truck containing Conni Black's decapitated corpse with an amputated arm on Interstate 275 in Kenton County, Kentucky, and further finding Steve Kritis extremely intoxicated, at 4:30 A.M. Lakeside Park Police arrested Steve Kritis for driving under the influence.

38. Boone County Police filed murder charges against Steve Kritis later that morning on February 19, 1994, the same date of Conni Black's death.

39. On May 20, 1994, Steve Kritis was indicted by a Boone County Grand Jury for second degree manslaughter, the equivalent of vehicular homicide, as to the death of Conni Black, and Steve Kritis was further indicted for felonious wanton endangerment as to Susan Stemler.

40. Based upon all the facts alleged hereinabove and incorporated from Plaintiff's original complaint, the Defendant Florence Police Officers and the Boone County Deputy Sheriffs actively participated in the events which cumulated [sic] in Conni Black's death, they demonstrated deliberate indifference to the constitutional rights of Conni Black, and they affirmatively facilitated the criminal and grossly negligent conduct of Steve Kritis, rendering them personally liable to Plaintiff under 42 U.S. §1983.

WHEREFORE, the Plaintiff requests all the relief in its Complaint.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, by ordinary U.S. Mail, postage prepaid, on the ___ day of August, 1994 to:

Hon. W. Kenneth Nevitt
Hon. R. Thaddeus Keal
One Oxmoor Place
1001 Bullitt Lane, Suite 202
Louisville, KY 40222

Hon. Larry J. Crigler
6024 Rogers Lane
P. O. Box 169
Burlington, KY 41005

Hon. Hugh Skees
Rouse, Skees, Wilson & Dillon
7699 Tanners Lane
Florence, KY 41042

Hon. R. Ken Westberry
Hon. Dave Whalin
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Louisville, KY 40202

Hon. Jeffrey C. Mando
Adams, Brooking, Stepner,
Woltermann & Dusing
421 Garrard Street
P. O. Box 861
Covington, KY 41011

ERIC C. DETERS

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 94-CI-202 AND CASE NO. 94-CI-0459

WILLIAM CHIPMAN, ADMINISTRATOR
OF THE ESTATE OF CONNI [sic] BLACK, PLAINTIFF

VS.

CITY OF FLORENCE, ET AL DEFENDANTS

AND

SUSAN STEMLER PLAINTIFF

VS.

CITY OF FLORENCE, ET AL DEFENDANTS

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

(Filed Apr. 2, 1996)

This is a consolidated tort action arising from the death of Connie Black and the arrest of Susan Stemler on February 19, 1994. William Chipman, Administrator of the Estate of Connie Black ("Chipman") alleges negligence on the part of Defendant police officers and their governmental employers in the performance of their duties at a traffic stop at the intersection of U.S. 42 and Tanners Lane which resulted in the death of Connie Black. Susan Stemler, on the other hand, asserts claims of assault and battery, malicious prosecution, abuse of process, false arrest and imprisonment, and outrage as a result of her arrest for DUI and her subsequent acquittal. Having completed extensive discovery, the matter is now before the Court on Defendants' Motions for Summary Judgment.

It is undisputed that on the evening of February 18, 1994, Connie Black, Steven Kritis and Susan Stemler were patrons at Willie's Tavern in Florence, Kentucky. All of the parties consumed alcoholic beverages. When Willie's closed, Black left with Stemler in her car and Kritis followed. Kritis chased them through residential streets near the Ramada Inn, at one point blocking them in the driveway at the home of William Minnick, a retired Florence Police Sergeant. The chase continued until the vehicles ultimately reached the intersection of U.S. 42 and Tanners Lane where Lt. Tom Dusing was flagged down. Stemler told Dusing all of the events that occurred at Ramada Inn and that Kritis had followed her and rammed her vehicle.

Florence Officer Bobby Joe Wince arrived on the scene and was assigned the task of handling Stemler. Upon speaking to Stemler, Officer Wince noted the odor of alcohol, conducted field sobriety tests, administered a PBT test (which read .105), and obtained an admission from Stemler that she had consumed alcoholic beverages.

Based upon the above, Officer Wince decided to arrest Stemler for DUI. Stemler was handcuffed by Officer Wince. Stemler was transported to St. Luke Hospital in Florence where a blood sample for alcohol analysis was drawn. She was then transported to the Boone County Jail.

Deputy Sheriff Ruthe, Officer Wince and Lt. Dusing all spoke to Kritis. Based on the totality of the circumstances, they decided not to arrest Kritis.

It was apparent to the officers that Black was intoxicated. The officers discussed whether to arrest Black for public intoxication or allow her to leave with Kritis. Black

was allowed to get into Kritis' truck and leave the scene. Shortly after leaving the scene, Kritis and Black were involved in an accident on I-75 in Erlanger, Kentucky in which Kritis' truck struck the guardrail. Connie Black died as a result of the accident.

As a result of the accident on I-75, Kritis was charged with Manslaughter, Second Degree, and Wanton Endangerment, First Degree. He eventually pled guilty to Reckless Homicide.

Appropriateness of Summary Judgment

The parties have filed extensive briefs on the question of summary judgment accompanied by affidavits and counter-affidavits. These have been considered by the Court together with the pleadings, numerous depositions and discovery materials in the record. Based upon this review, the Court must conclude that, although there are numerous disputes with respect to ancillary facts, except as hereinafter noted, there exists no genuine issue with respect to the facts material to the legal principles supporting the summary judgment granted herein, *Steelvest v. Scansteel Service Center*, Ky., 807 S.W.2d 476 (1991).

The Chipman Claim – Case No. 94-CI-00202

With respect to Chipmans's wrongful death claim, the court finds that the decisions in *Ashby v. City of Louisville*, Ky. App., 841 S.W.2d 184 (1992) and *Fryman v. Harrison*, Ky., 896 S.W.2d 908 (1995) are controlling. An actionable claim of negligence depends on the existence of the duty, and, unless a "special relationship" existed,

there was no duty owing by any of the Defendants to Connie Black to protect her from crime. For a special relationship to exist two conditions are mandatory: (1) the victim must have been in state custody or otherwise restrained by the state at the time the injury-producing violent act occurred and, (2) the violence or other offensive conduct must have been perpetrated by a state actor. *Ashby v. City of Louisville*, Supra. Neither of these conditions can be found in the undisputed material facts of this case. There is no evidence from which it can be concluded that Black was in custody or restrained by the state at the time the pick-up struck the guardrail. Further, there is no evidence to support a claim that the conduct which caused the pick-up to leave the roadway and strike the guardrail was perpetrated by any of the Defendants or any other "state actor".

For these reasons, Defendants' Motions for Summary Judgment are sustained.

The Stemler Claims – Case No. 94-CI-459

Assault and Battery

With respect to the assault and battery claim of Stemler, the Court finds that there is a genuine issue of material fact with respect to the force used by Wince in arresting her and to that extent, Defendants' Motion for Summary Judgment is overruled. However, as to Doland and Dusing, they are entitled to judgment as a matter of law on this claim since it is undisputed that they were not involved in the physical arrest or handcuffing of Stemler.

Malicious Prosecution, False Arrest and Imprisonment

Stemler was twice tried on the DUI charge in Boone District Court. The first trial resulted in a hung jury and the second trial resulted in acquittal. The existence of probable cause for Defendants to arrest Stemler for DUI is fatal to their claim for malicious prosecution. *Broaddux v. Campbell,* Ky. App., 911 S.W.2d 281 (1995); *Raine v. Drasin,* Ky., 621 S.W.2d 895 (1981); *Kirk v. Marcum,* Ky. App., 713 S.W.2d 481 (1986). The Defendants are police officers and therefore there is no distinction between Stemler's claim of false arrest and false imprisonment. *Lexington-Fayette Urban County Govt. v. Middleton,* Ky. App., 555 S.W.2d 613 (1977). The existence of probable cause to arrest Stemler for DUI is similarly fatal to the false arrest-false imprisonment claim. *McCray v. City of Lake Louisville,* Ky., 332 S.W.2d 837 (1960).

There are no genuinely disputed material facts relating to the question of probable cause for the arrest of the Plaintiff, Stemler. Stemler stated at the scene that she had consumed alcohol, she had the smell of alcohol on her person, her performance on the field sobriety tests and her preliminary breath best result of .105 certainly constitutes probable cause. *Allen v. Commonwealth,* Ky. App., 817 S.W.2d 458 (1991).

Further, in the process of Stemler's DUI trials, Boone District Judge, Charles Moore, made a specific finding of the existence of probable cause in overruling Stemler's motion to dismiss the charges at the conclusion of the prosecution case and by overruling Stemler's pre-trial motion to suppress evidence. A specific finding of probable cause in the underlying criminal action precludes a

malicious prosecution action. *Broaddus v. Campbell*, supra. Defendants' Motions for Summary Judgment with respect to the claims of malicious prosecution, false arrest and false imprisonment are sustained.

Abuse of Process

The elements of a claim for abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in regular conduct of the proceeding. *Mullins v. Richards*, Ky. App., 705 S.W.2d 951 (1986), *Bonnie Braes Farms, Inc. v. Robinson*, Ky. App., 598 S.W.2d 765 (1980).

In responding to Defendants' Summary Judgment Motion, Stemler has the burden to identify evidence which presents a genuine issue of material fact supporting her claim. Stemler has identified no such evidence.

Further, it is undisputed that Assistant Attorney General Larry Fentress, Special Prosecutor in the Stemler DUI trials, controlled the cases and independently made the prosecutorial decisions.

Defendants' Motion for Summary Judgment on the claim of abuse of process is sustained.

Intentional Infliction of Emotional Distress: Outrage

Plaintiff's claim of intentional infliction of emotional distress/outrage is controlled by the holding in *Rigazio v. Archdiocese of Louisville*, Ky. App., 853 S.W.2d 295 (1993). Defendants' conduct about which Plaintiff complains raises claims under the traditional torts discussed above

(assault and battery, false arrest and imprisonment, malicious prosecution, abuse of process). For this reason, there is no viable action in this case for the tort of outrage.

Further, "so long as the officer's conduct is reasonable under the circumstances, he is immune from an action for intentional infliction of emotional distress regardless of the extent of the plaintiff's emotional distress and regardless of whether or not the plaintiff is convicted of the crime." *Kentucky Jurisprudence*, Torts, Section 11-8 p. 317. Defendants' Motion for Summary Judgment on the question of intentional infliction of emotional distress is sustained.

Accordingly, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. That Defendants' Motion for Summary Judgment on all claims asserted by Chipman in Case No. 94-CI-00202 is granted since there is no genuine issue of a material fact and Defendants have demonstrated entitlement to judgment as a matter of law, and that action is hereby dismissed with prejudice;

2. Defendants' Motion for Summary Judgment in Case No. 94-CI-459 on Stemler's claim of assault and battery is denied as to Defendants' Wince and the City of Florence since there are issues of material fact; and,

3. Defendants' Motion for Summary Judgment in Case No. 94-CI-459 on Stemler's claim for assault and battery against Defendants Dusing and Dolan is granted and Defendants Motion for Summary Judgment on the remainder of Stemler's claims in that action against all

Defendants is granted, since there is no genuine issue of a material fact and Defendants have demonstrated entitlement to judgment as a matter of law, and that action is, with the exception of the assault and battery claim against Defendants Wince and the City of Florence, dismissed with prejudice.

In light of the above ruling, the Court orders as follows:

a) That the Plaintiffs file with the Court and serve by hand delivery or fax upon opposing counsel a list of witnesses and a brief summary of their anticipated testimony by 3:30 p.m., April 12, 1996.

b) That the Defendants file with the Court and serve by hand delivery or fax upon opposing counsel a list of witnesses and a brief summary of their anticipated testimony by 3:30 p.m., April 15, 1996.

c) That the Pre-trial Conference previously scheduled for April 8, 1996 is re-scheduled for April 19, 1996 at 9:00 a.m.

All Motions in Limine shall be filed with the Court no later than April 17, 1996 and a copy served on opposing counsel by hand or fax no later than April 17, 1996 at 3:30 p.m.

SO ORDERED this the 2 day of April, 1996.

/s/ Joseph F. Bamberger
JUDGE
JOSEPH F. BAMBERGER
BOONE CIRCUIT COURT

COPIES TO:
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